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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

KINNEAR-WEED CORPORATION, *Petitioner*

v.

HUMBLE OIL AND REFINING COMPANY,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

KINNEAR-WEED CORPORATION, *Petitioner*

v.

HUMBLE OIL AND REFINING COMPANY, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review Findings of Fact and Conclusions of Law entered September 28, 1956 and the judgment of the United States District Court for The Eastern District of Texas, entered in the above-entitled case on October 10, 1956; the opinion and judgment of the United States Court of Appeals for The Fifth Circuit both entered Sept. 22, 1958; Per Curiam Opinions of said Court of Appeals both entered April 30,

1959 and July 2, 1959; Per Curiam Opinions of said Court of Appeals both entered March 15, 1961; Supplemental Opinion and, Corrected Judgment of said Court of Appeals both entered May 17, 1961.

## CITATIONS TO OPINIONS BELOW

The United States District Court for the Eastern District of Texas made no written opinion but entered Findings of Fact and Conclusions of Law Sept. 28, 1956 in APPENDIX B-4 hereto, infra, p. 76 and is reported in 150 F. Supp. 143; Opinion of the United States Court of Appeals for the Fifth Circuit entered Sept. 22, 1958 in APPENDIX B-1 hereto, infra, p. 65 and is reported in 259 F. 2d 398, and PER CURIAM Opinion of said Court of Appeals entered April 30, 1959 in APPENDIX B-2 hereto, infra, p. 73 and reported in 266 F. 2d 352, and, PER CURIAM Opinion (Not Reported) of the said Court of Appeals entered July 2, 1959 in APPENDIX B-3 hereto, infra, p. 75; Supplemental Opinion (Not Reported of the Court of Appeals entered May 17, 1961 in APPENDIX H-1 hereto, infra, p. 139; New Judgment of said Court of Appeals entered May 17, 1961 in APPENDIX H-2 hereto, infra, p. 141; Opinion of the United States District Court for the District of Columbia in APPENDIX C-2 hereto, infra, p. 121, and reported 95 F. Supp. 55; Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia holding "Petitioner's patent claims valid, patentable and defining invention" in APPENDIX C-1 hereto, infra, p. 117; Judgment of the United States District Court of the District of Columbia in APPENDIX C-3 hereto, infra, p. 129.

## JURISDICTION

The Judgment of the United States District Court for The Eastern District of Texas was entered October 10, 1956 (R. XVI, 4323), printed in Appendix B-5 hereto, infra, p. 114. The Judgment of The United States Court of Appeals for The Fifth Circuit was entered Sept. 22, 1958 (R. XVI, 4410), printed in Appendix B-1 hereto, infra, p. 65, Rehearing denied on April 30, 1959 (R. XVI, 4639-40), printed in Appendix B-2 hereto, infra, p. 73, and Second Rehearing denied on July 2, 1959 (Supp. Tr. of R. XVI, 34) printed in Appendix B-3 hereto, infra, p. 75; Order set forth in Appendix A-1 hereto, infra, p. 61 (Not Reported) of the United States Court of Appeals for the Fifth Circuit entered December 27, 1960 granting petitioner leave to file Petitioner's MOTION TO OPEN CASE, etc.; FINAL ORDER OF THE UNITED STATES COURT OF APPEALS For the Fifth Circuit set forth in APPENDIX A-2 hereto, infra, p. 63, (Not Reported) entered March 15, 1961 denying petitioner's MOTION TO OPEN CASE, etc.; Final Order set forth in APPENDIX A-3 hereto; infra, p. 64 (Not Reported) of the United States Court of Appeals for the Fifth Circuit entered March 15, 1961 denying petitioner leave to file MOTION ON NEWLY DISCOVERED FRAUD, etc., tendered to said court on March 4, 1961, and, Corrected Judgment of said Court of Appeals entered May 17, 1961, set forth in APPENDIX H-2, infra, p. 141. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

The Court of Appeals and the judges thereof after hav-

ing been served copies of the Petition for Writs of Certiorari and/or Mandamus and/or Prohibition, etc., docketed May 15, 1961 in the Supreme Court in Case No. 1131, Misc., October Term, 1960 did within 5 days thereof make its SUPPLEMENTAL OPINION and Corrected JUDGMENT in an attempt to EXTRICATE themselves from the LEGAL ANARCHY practiced upon your Petitioner as charged and fully set forth in said motion and petition in said case No. 1131, Misc., and, additional LEGAL ANARCHY is more particularly set forth beginning with QUESTIONS PRESENTED I through XVIII and beginning with REASONS FOR GRANTING THE WRIT I through XVI.

The Supreme Court will take JUDICIAL NOTICE, that, The United States Court of Appeals for the Fifth Circuit and its Judges thereof, *"illegally"* and ARBITRARILY have held Petitioner's patent reissue No. 23416 invalid and void for many years, and, *"steadfastly, refused"* after repeated requests from petitioner, to *"change"* the illegal judgment against your petitioner and for respondent, *"until"* May 17, 1961 after, and, *"only after"* said Court of Appeals and its Judges were charged, by petitioner, with practicing LEGAL ANARCHY against your petitioner, as set forth in petition No. 1131 MISC., October Term, 1960 docketed May 15, 1961 in The Supreme Court.

The said Court of Appeals and its Judges were notified many times, that, Judgment was illegal for respondent and against petitioner pertaining to the validity of petitioner's patent, for example, (see R. XVI, pages 4456 through 4459, and, 4501 through 4503, all of which are set forth in BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF PETITION FOR REHEARING filed in

said Court of Appeals December 12, 1958). The above is positive evidence that said Court of Appeals and its Judges thereof have knowingly and in dereliction of their duty, refused petitioner, Due Process of Law; a fair trial in a fair tribunal, by knowingly and illegally, *"after due notice"*, did hold Affirmed the District Court Judgment which decreed petitioner's Reissue Patent No. 23416 invalid and void; therefore, your petitioner *"has not"* and "cannot" receive a JUST adjudication of its rights against "Big Business", such as respondent corporation, in The United States Court of Appeals for the Fifth Circuit.

The Supreme Court will take further JUDICIAL NOTICE, that, said Court of Appeals and its Judges thereof has *"USURPED"* petitioner's patent rights, *"after due notice"* for many years by holding, affirming and adjudging petitioner's patent invalid and void, and, has *"discriminated"* against your petitioner, and, *"now admits"* such discrimination by Supplemental Opinion set forth in APPENDIX, H-1, infra, p. 139 and Corrected Judgment set forth in APPENDIX, H-2, infra, p. 141.

*"Time"* and *"Limitation"* has illegally been allowed to run against petitioner's patent Reissue No. 23416, which under the present law *"can never"* be "regained"; and therefore, The United States Court of Appeals for the Fifth Circuit and its Judges thereof have *"knowingly violated"* their Oath of Office, and, violated every Rule of JUSTICE set forth in the Federal Laws and Constitution of The United States.

The Supreme Court is requested to thoroughly and meticulously scrutinize every aspect of the illegal judgments for respondent and against petitioner in this case, and *"prevent"* The Court of Appeals and its Judges thereof from *"now"* coming in at this *"late date"* of May 17, 1961 and "LABELLING" their Supplemental Opinion

and Corrected Judgment a CLERICAL MISTAKE, which was *"only"* made by said Court of Appeals and its Judges thereof to save their *"own"* JUDICIAL HIDES at the *"expense"* of your petitioner, *"and only"*, after being charged with practicing LEGAL ANARCHY against your petitioner set forth in Case No. 1131 MISC., October Term 1960, docketing May 15, 1961 in The Supreme Court.

## QUESTIONS PRESENTED

### I.

Judge Lamar Cecil, United States District Judge sitting in this case lacked jurisdiction to hear, try and render judgment in this case because of his substantial interest in the case and was so related to or connected with the party respondent to disqualify said judge under 28 U.S.C. Sec. 455, the facts of which were unknown to petitioner during such times, and, thereby said judge rendered a fraudulent judgment for respondent against your petitioner. Should said Judge without jurisdiction be allowed to enter and hold the fraudulent judgment for respondent and against your petitioner as has been done in this case?

### II.

Judge Lamar Cecil, United States District Judge in this case did sit and render fraudulent judgment for respondent and against your petitioner by illegally concealing from petitioner and all courts in this case his substantial interest in this case and was so related to or connected with the party respondent to disqualify said judge under 28 U.S.C. Sec. 455, and, thereby said judge deceived and practiced fraud upon all courts in this case and upon your petitioner

for respondent all without knowledge to petitioner and all of said courts in this case. Should said Judge be allowed to practice fraud and deceit and to conceal his substantial interest, relationship and connection from all Courts in this case including the Supreme Court and your petitioner, and, enter and hold fraudulent judgment as has been done in this case for respondent and against your petitioner?

## III.

Respondent, its executives, agents and attorneys had knowledge of the facts that Judge Lamar Cecil was disqualified and was illegally sitting as United States District Judge in this case because of his substantial interest in this case and was so connected with the party respondent to disqualify said judge under 28 U.S.C. Sec. 455 and did conceal and conspire to conceal said facts from all courts in this case and your petitioner and by said conspiracy to conceal and said concealment said respondent its executives, agents and attorneys did conspire, deceive and practice fraud upon all courts in this case and your petitioner and caused a fraudulent judgment to be rendered for respondent and against your petitioner all without knowledge to petitioner and all of said courts in this case. Should respondent, its executives, agents and attorneys with unclean hands be permitted to knowingly conceal and conspire to conceal from all Courts in this case including The Supreme Court and your petitioner, facts relating to disqualification of said district Judge to act as judge in this case who rendered fraudulent judgment for respondent and against your petitioner, and, deceive said Courts and your petitioner as was done in this case? Should said fraudulent judgment be allowed to stand for respondent and against your petitioner, because of said unclean

hands? Should respondent, its executives, agents and attorneys be made to answer for their said unclean hands?

IV.

Judge Lamar Cecil, United States District Judge in this case, and respondent, its executives, agents and attorneys had knowledge of said facts that Judge Lamar Cecil was disqualified and was illegally sitting as United States District Judge in this case because of his substantial interest in this case and was so related to or connected with party respondent to disqualify said judge under 28 U.S.C. Sec. 455 and did conceal and conspire to conceal said facts from all courts in this case and your petitioner and by said conspiracy to conceal and said concealment said Judge Lamar Cecil, respondent, its executives, agents and attorneys did conspire, deceive and practice fraud upon all courts in this case and your petitioner and caused a fraudulent judgment to be rendered for respondent and against your petitioner all without knowledge to said petitioner and all of said courts in this case. Should said Judge, respondent, its executives, agents and attorneys be permitted to conspire and conceal said facts of disqualification of said Judge from all Courts in this case including the Supreme Court and your petitioner? Should said fraudulent judgment be allowed to stand for respondent and against your petitioner?

V.

The United States Court of Appeals for the Fifth Circuit and the judges thereof, Hon. Richard T. Rives, Hon. Warren L. Jones, and Hon. John Minor Wisdom by their order of March 15, 1961 denied petitioner any relief and the right to prove the averments and fraud alleged in

petitioner's Dec. 5, 1960 MOTION TO OPEN CASE, etc., ordered filed in said Courts Dec. 27, 1960 which motion and supporting brief with attached Exhibits of petitioner on its face makes out a "prima facie" case of fraud as averred to have been practiced by Judge Lamar Cecil, respondent its executives, agents, and attorneys upon all courts in this case and your petitioner; and, by said order of March 15, 1961 and said court and said judges thereof have prevented and deprived petitioner from introducing into court evidence to prove said fraud and make a record thereon to the ultimate facts of said fraud and thereby said court and said judges thereof defeated the eventual exercise of the appellate jurisdiction of the Supreme Court to review the said fraud practiced upon your petitioner and upon all courts in this case including the Supreme Court resulting in fraudulent judgments for respondent and against your petitioner. Should said Court of Appeals and said Judges with uncontradicted documents prima facie on their face before them be permitted to disregard said documents and Title 28 U.S.C. Sec. 455 and applicable Supreme Court rulings cited, and, allow fraud to be practiced by said Judge Lamar Cecil, repondent its executives, agents and attorneys upon all Courts including the Supreme Court and your petitioner as has been done in this case? Should the Supreme Court be denied the right to review the ultimate facts in evidence of said fraud?

VI.

The United States Court of Appeals for the Fifth Circuit and the judges thereof, Hon. Richard T. Rives, Hon. Warren L. Jones, and the Hon. John Minor Wisdom by another order of March 15, 1961 denied petitioner the right to file petitioner's March 3, 1961 averments alleged

in MOTION ON NEWLY DISCOVERED FRAUD, etc., tendered to said court on March 4, 1961, and, by said order of March 15, 1961 said court and said judges have prevented and deprived petitioner from introducing into court evidence to prove said averments alleged in said motion of fraud, misrepresentation, misconduct, perjury, subornation of perjury, conspiracy to practice fraud, false swearing, mail fraud, and conspiracy to practice mail fraud by Mary Reed Cecil (wife of Judge Lamar Cecil), respondent, its executives, agents and attorneys upon the United States Court of Appeals for the Fifth Circuit and your petitioner in attempting to avoid the fraudulent judgments in this case for respondent against your petitioner, and, by said order of March 15, 1961 said court and said judges thereof have prevented and deprived petitioner from introducing into court evidence to prove said averments alleged in said motion and referred to exhibits therein and make a record thereon of the ultimate facts "prima facie" on their face of said averments alleged in said motion and referred to exhibits therein and thereby said court and said judges thereof defeated the eventual exercise of the appellate jurisdiction of the Supreme Court to review the said fraud, misrepresentation, misconduct, perjury, subornation of perjury, conspiracy to practice fraud, false swearing, mail fraud, and conspiracy to practice mail fraud, practiced upon your petitioner and said United States Court of Appeals in this case resulting in the continuation of the fraudulent judgments for respondent and against your petitioner in this case. Should said Court of Appeals and said Judges with uncontradicted documents prima facie on their face before them, be permitted to disregard said documents, Title 28, U.S.C. Sec. 455 and applicable Supreme Court rulings cited and per-

mit fraud, false swearing, mail fraud, conspiracy to practice mail fraud, misrepresentation, misconduct, set out herein and in petitioner's motion APPENDIX D-1, to be practiced upon all Courts including the Supreme Court anud your petitioner as has been done in this case for respondent and against your petitioner? Should said fraudulent Judgments be continued for respondent and against your petitioner?

VII.

The United States Court of Appeals and the judges thereof in their opinion of Sept. 22, 1958 held

> "The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the form of combination bit shown in the patent. * * * The judgment of the district court is therefore AFFIRMED."

The judgment of the district court decreed:

> "1. That U. S. Patent No. Re. 23,416 is invalid and void;"

Should the Supreme Court allow and permit the inferior courts of the United States to hold a patent invalid denying patentee due process of law by arbitrarily voiding patentee's patent property rights when said inferior courts cannot satisfy themselves as to the validity of said patent as was done by the Court of Appeals in this case?

VIII.

Respondents, its executives, agents and attorneys because of their unclean hands and fraud practiced upon petitioner

in this case by concealing from petitioner and the courts the facts as set forth and averred in Motions before the Court of Appeals and in this petition showing and pertaining to the disqualification of Judge Lamar Cecil to sit and act as judge in the District Court in this case, has caused fraudulent judgment to be entered against your petitioner and for respondent, which has caused your petitioner great injury, damage, and loss of profits to Petitioner's business and property rights in suit together with additional costs, expenses and attorney's fees incurred by petitioner because of said unclean hands and fraud and concealment thereof practiced by Respondent to obtain said fraudulent judgments in this case for which petitioner respectfully requests the Court to order an accounting therefor and enter judgment thereon against Respondent and for petitioner. Should the Supreme Court allow and permit as in this case a winning litigant such as respondent with unclean hands, fraud and concealment thereof knowingly obtain fraudulent judgments against a losing litigant such as your petitioner in the case without said present respondent having to pay damages and make full restitution to your said present petitioner because of said unclean hands and fraud practiced by respondent upon your petitioner?

IX.

The United States Court of Appeals and the Judges thereof, Hon. Richard T. Rives, Hon. Warren L. Jones and Hon. John Minor Wisdom by their order of March 15, 1961 treated Petitioner's Motion as a Rule 60 (b) FRCP Motion, when in fact, said Motion is purely in equity, based on the fraud set out in said Motion and this Petition which fraud was practiced by Respondent on Petitioner without knowledge of Petitioner, which

fraud was not discovered by Petitioner until more than the one (1) year after Judgment of the District Court, therefore, Rule 60(b) FRCP is not the appropriate remedy, nor the remedy requested by your petitioner. Should the Court of Appeals and the Judge thereof be permitted to arbitrarily change petitioner's motion plead in equity to a Rule 60(b) FRCP Motion to defeat petitioner's rights and hold petitioner solely to proceed under Rule 60(b) as a sole exclusive remedy instead of proceeding in equity. If permitted to do so, fraud as in this instant case, could be discovered by a litigant one (1) year after judgment and go unchallenged. Further, should said Court of Appeals and said Judges in all respects have writs of mandamus issued and entered against them, forcing said Court and said Judges to void and vacate all judgments, orders, and decrees for respondent and against your petitioner, and, writs of prohibition issued and entered against said Court of Appeals, said Judges and respondent prohibiting them from enforcing and exercising said fraudulent judgments for respondent and against you petitioner as set out in this petition and in the motion presented to the Court of Appeals in this procedure.

## X.

The Court of Appeals and its judges in an attempt to cure their own faulty, fraudulent and illegal judgment, and, the faulty, fraudulent and illegal judgment of the District Court has *knowingly perpetrated* a fraudulent judgment upon all Courts in this case and upon your petitioner, and its property rights in suit in failing and refusing to give force and effect to Title 28 U.S.C. Sec. 455 in view of the undisputed and uncontradicted documents of *record* which is *"prima facie"* evidence that the judg-

ments of the District Court and the Court of Appeals are fraudulent and illegal, and, thereby said Court of Appeals and its Judges practiced fraud, violated their oaths of office, committed acts of misconduct in office, and denied petitioner due process of law as provided by the Constitution of the United States in AMENDMENT V thereto, all of which *denied* petitioner a fair trial in a fair tribunal, which is positive proof that said court and said judges thereof had and did knowingly practice personal bias and prejudice for Respondent and against your Petitioner on its claims or causes of action set forth in Petitioner's Complaint charged against Respondent. Should said Court of Appeals and its judges in its SUPPLEMENTAL OPINION set forth in APPENDIX H-1, and, CORRECTED JUDGMENT set forth in APPENDIX H-2, both entered of record by said court in this case on May 17, 1961, be permitted to knowingly order, adjudge, and decree said fraudulent and illegal CORRECTED JUDGMENT for Respondent and against Petitioner, and, to knowingly uphold and affirm the fraudulent and illegal Judgment of the District Court for Respondent and against Petitioner in this case?

XI.

The Court of Appeals has a conflict within its own opinions and judgments in this case because in its opinion and judgment of Sept. 22, 1958 said court held,

> "The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the form of combination bit shown in the patent. * * * The judgment of the District Court is therefore AFFIRMED.

The judgment of the District Court decreed:

> "1. That U. S. Patent No. Re. 23,416 is invalid and void."

Said Court of Appeals in its SUPPLEMENTAL OPINION set forth in APPENDIX H-1 of May 17, 1961, states:

> "The judgment of the district court is therefore modified by striking therefrom that part which declares that U. S. Patent No. Re. 23,416 is invalid and void, and, as so modified, said judgment is affirmed."

Should said Court of Appeals who were *unable* to satisfy themselves whether or not said patent is valid and *defines* the *"standard of invention"* written into the Constitution of the United States, be permitted to make its CORRECTED JUDGMENT set forth in APPENDIX H-2 of May 17, 1961 and thereby strike down the judgment of the District Court who held said patent *"invalid and void"* and thereby place Petitioner's patent and property rights in double jeopardy pertaining to the validity or invalidity of said patent, when in fact, said court being in doubt as to the validity of said patent should have overruled the judgment of the District Court on the question of validity of said patent which question was before it and should have held by its judgment that said patent was valid under such circumstances, otherwise its CORRECTED JUDGMENT is in conflict with its own prior decisions and that of the Supreme Court on the legal question when said court is in "DOUBT" as to validity of a patent said court should have held said patent in issue valid, as provided by statute Title 35 U.S.C. Sec. 282, set forth in APPENDIX G-8, (*Charles Peckat Mfg. Co. et al. v. Jacobs,*

178 F. 2d 794, c.d. 70 S. Ct. 575, 339 U.S. 915; *Radio Corporation of America v. Radio Laboratories*, 239 U.S. 1, 7, 55 S. Ct. 928, 931, 79 L. Ed. 163)?

## XII

The Court of Civil Appeals had the issue of validity of U. S. Patent Re. 23,416 before it upon appeal, yet, said court *failed* and *refused* to *rule* upon the question of validity of said patent when the question of validity of said patent was raised by the answer of Respondent to Petitioner's Complaint and urged before said District Court and ruled upon by said District Court holding said patent invalid and void. Should said Court of Appeals be permitted to *dodge* the *issue* of validity of said patent and fail and refuse to pass upon the question when said issue was before it on appeal after the District Court by its judgment held said patent invalid and void. The Court of Appeals in refusing and failing to rule on the validity of Petitioner's patents is in violation of the rule of law laid down by the Supreme Court in the case of *Great Atlant. & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 158 (95 L.Ed. 163) at pages 154 and 150 held:

> "It is worth emphasis that every patent case involving validity presents a question which requires reference to a standard written into the Constitution."
>
> "The Court now recognizes what has long been apparent in our cases: that it is the standard of invention" that controls. That is present in every case where the validity of a patent is in issue. *It is that question which the Court must decide.* No 'finding of fact' can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case. We speak with final authority on that constitutional issue as we do on many other.". (Emphasis ours.)

Should the Court of Appeals be permitted to disregard the rule of law held by the Supreme Court on the question above set forth and refuse to rule on the validity of Petitioner's Patent?

## XIII.

The Court of Appeals affirmed the judgment of the District Court which held:

> "2. That U. S. Patent No. Re. 23,416 has not been infringed by Defendant, Humble Oil & Refining Company;"

The Court of Appeals also held that it could not satisfy itself as to the validity of said patent. Since the Court of Appeals admittedly holds that it cannot satisfy itself as to the validity of said patent it is evident that it is beyond the court's capacity to *understand* and *interpret* the patent. The Court being unable to compare the structure of the patent with the structure of the prior art patents to determine the question of validity, how can said court compare the same structure of the patent with the structure of the accused devices and be able to understand and interpret the structure of the device in the patent in comparison to the structure of the accused devices and rule on the question of infringement? Under the *admitted ruling* of the said Court of Appeals holding that it could not satisfy itself as to validity of said patent, it would be *impossible* for said court to rule on whether or not said patent was valid or invalid, infringed or non-infringed, since it is *double talk* for said Court to *plead ignorance* on the question of the validity of said patent on the one hand, while *exuberating brilliance* on the ques-

tion of infringement on the other hand in holding said patent non-infringed, using the structure of the patent in both instances, and stating that said Court *does not understand* the patent on the question of validity but "clearly" understands the structure of the patent on the question of infringement. This is *prejudicial* to petitioner's rights and in violation of "Due process of law" provided in *Amendment V* of the Constitution of the United States. Should the Court of Appeals be permitted to affirm the judgment of the District Court holding said patent non-infringed by Respondent when said Court of Appeals cannot satisfy themselves as to the validity of the same patent which said court *admits it does not understand* and *cannot interpret?*

XIV.

There is a conflict within the opinion of the Court of Appeals because said court agreed with the District Court ON THE DISPOSITION of Petitioner's Claims charged against Respondent other than for patent infringement, and held:

> "Further, we agree with the DISPOSITION by the District Court of the claims other than for patent infringement."

The District Court DISPOSED of all claims charged by Petitioner against Respondent by *pitching its entire decision and judgment* on the *"theory"* that all of the claims charged in the complaint by Petitioner against Respondent *involve and are inextricably connected with Petitioner's Patents in suit* as held in the District Court FINDING OF FACT 3 set forth in APPENDIX B-4 which states:

"Plaintiff charges defendant with breach of confidential relationship, unfair competition, patent infringement and violation of the Federal and Texas anti-trust laws. All of these claims involve and are inextricably connected with, the above-mentioned two Kinnear patents, Nos. 2,380,112 and Re. 23,416."

The District Court in its FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT, held Petitioner's patent No. Reissue No. 23,416 invalid and void:

"1. That U. S. Patent No. Re. 23,416 is invalid and void;"

The Court of Appeals in its SUPPLEMENTAL OPINION set forth in APPENDIX H-1 and its CORRECTED JUDGMENT set forth in APPENDIX H-2 both dated May 17, 1961 *"reversed"* and *"struck down"* the judgment APPENDIX B-5 of the District Court which had held Petitioner's Patents invalid and void, and held as follows:

"The judgment of the district court is therefore modified by striking therefrom that part which declares that U.S. Patent No. Re. 23,416 is invalid and void. and, as so modified, the said judgment is affirmed."

Therefore, the District Court misinterpreted Petitioner's Patent as not defining invention, which was struck down by the Court of Appeals.

The District Court clearly erroneously held in FINDING OF FACT 52 that,

"There is no suggestion in either patent that any of the water courses should be so positioned that the drill-

> ing fluid issuing therefrom would be discharged so as to miss the cutters and strike directly onto the bottom of the hole. On the contrary, the drilling fluid discharged from each of the water courses of the bit disclosed in the patents would hit the cutting elements."

The Court of Appeals found in Petitioner's Reissue Patent No. 23,416 that:

> "* * * Kinnear, * * *, had recognized the importance of having the drilling fluid strike directly on the bottom of the hole, * * *."

The above plainly sets out the conflicts within the opinion of the Court of Appeals of Sept. 22, 1958 set forth in APPENDIX B-1 and the SUPPPLEMENTAL OPINION set forth in APPENDIX H-1 and CORRECTED JUDGMENT set forth in APPENDIX H-2 both dated May 17, 1961, because the Court of Appeals overruled the District Court on the interpretation of Petitioner's Patents and found that the District Court in its *"theory"* WRONGFULLY DISPOSED of Petitioner's claims and charges in its Complaint against Respondent based on the FINDINGS OF FACT 3 of the District Court. Yet, the Court of Appeals makes the conflicting opinion, that:

> "Further, we agree with the DISPOSITION by the district court of the claims other than for patent infringement."

Here we find the Court of Appeals overruling the District Court's interpretation of Petitioner's Patent Re. 23,416 and holding that the District Court WRONGFULLY DISPOSED of Petitioner's claims charged against

Respondent, because the District Court in FINDING OF FACT 3, held:

> "* * *. All of these claims involve, and are inextricably connected with, the above-mentioned two Kinnear patents * * *."

Should the Supreme Court permit the Court of Appeals to find in one place that the District Court WRONGFULLY DISPOSED of Petitioner's claims charged against Respondent, and, then within the same opinion permit the Court of Appeals to hold:

> "further, we agree with the DISPOSITION by the district court of the claims other than for patent infringement."

Should the Supreme Court permit the Court of Appeals to use such *highhanded and flagrant* violation of Petitioner's rights in this case and make decrees and judgments as has been done for Respondent and against your petitioner by CONFLICTS as above-mentioned in the opinions and judgments of said Court of Appeals?

## XV:

The Court of Appeals misinterpreted Petitioner's Patent Re. 23, 416, some glaring examples of which are set out below:

1. The Court of Appeals interpreted the Kinnear Re. Patent No. 23,416 as follows:

> "* * * Kinnear, * * *, had recognized the importance of having the drilling fluid to strike directly on the bottom of the hole, * * *."

Whereas, the Kinnear patent specification states, in Column 5, lines 49-63 on this point as follows:

> "This position of these fluid course ducts with respect to the cutting elements, and with respect to their emerging on the exterior surface and well upon the outside surface of the bit body *are of extreme importance* as this allows the flushing fluid (drilling fluid) to directly blast cuttings away from the outer side periphery of the bit body, directly blast down the front faces of the inner cutting elements, directly blast along the side of the outer bottom roller cutters, and *directly blast the bottom of the well hole* in the *near proximity* of where the inner bottom cutting elements and the outer bottom roller cutters takes their respective cuts in the substance being drilled." (Emphasis ours)

The Court of Appeals in its interpretation uses the word "strike", whereas, no such word appears in the Kinnear patent. The words "directly blast" set out in the Kinnear patent and patented claims thereof is altogether a DIFFERENT "*Mode of Operation*" than the meaning of the words "directly strike" as WRONGFULLY used by the Court of Appeals in its opinion of Sept. 22, 1958 as set forth in APPENDIX B-1.

2. The Court of Appeals interpreted the Kinnear Re. Patent No. 23,416 as follows:

> "Kinnear, * * *, did not disclose the necessity of having the water courses (fluid ducts), lined with erosion resisting material * * *."

Whereas, the Kinnear patent specification in Column 4, lines 28-31 on this point states, as follows:

"hard surface material may be attached to *any* or *all* of the *cutting elements* or *bearing surfaces* in the well known manner." (Emphasis ours)

The District Court in Finding of Fact 27, states that:

"27. * * * (a) the nozzles had to be lined with an extremely hard, *erosion resistant material* or they would become enlarged very quickly and would no longer be the proper size, and (b) the cutting elements of the bit had to be protected from the abrasive effects of the high velocity jet streams, either by *hard surfacing* or, preferably, by directing the streams so as to miss the cutting elements and hit the bottom of the hole." (Emphasis ours)

The specification quoted above of the Kinnear patent particularly sets out that the *cutting elements and bearing surfaces* of his bit has *"hard surface material"* attached thereto. The bearing surface within the nozzles in the bit are part of the bearing surfaces of the bit to be protected by *"hard surface material."* Here again both District Court and the Court of Appeals misinterpreted the Kinnear patent which is a question of law and should be reviewed by the Supreme Court.

3. The Court of Appeals misinterpreted the Kinnear patent in its Opinion of Sept. 22, 1958 as set forth in APPENDIX B-1, and held:

"Appellant emphasizes that none of the claims of the patent include *these two smaller ducts*. That is true, but neither do any of the claims exclude them." (Emphasis ours)

Here again the Court of Appeals misinterpreted the Kinnear patents on a vital issue of law, since the interpreta-

tion of a patent is a question of law, and *deliberately* includes and *adds elements* or parts into the claims of the Kinnear patent but admits in the above quoted portion of its opinion "that none of the claims of the patent include *"these two smaller ducts"* which is in direct conflict on a question of law with the rulings of the Supreme Court that elements or parts may not be written into the unambiguous claims of a patent, and there is no ambiguity in said claims, and, the Court of Appeals could not and did not point out any ambiguity of the claims of the Kinnear patent. (Cases stating that *"adding"* or *"substracting"* elements or parts in the claims of a patent are *forbidden* are as follows: *White v. Dunbar*, 119 U.S. 7, 51-52, 30 L.Ed. 303; *Graver Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 277, 69 S.Ct. 535; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 430, 52 L.Ed. 1122; and, previous decisions of the Fifth Circuit held that elements or parts could not be written into the plain and unambiguous claims of a patent, in the following cases *Truman B. Wayne & Visco Products Co., et al v. The Texas Company*, 175 F. 2nd 234, 235; and, *Wayne et al v. Humble Oil and Refining Company*, 175 F. 2nd 230-234; and, *Cameron Iron Works v. Stekoll*, 242 F. 2nd 17-22).

The interpretation of a patent and its claims is a question of law for the court to determine as was held in the cases as follows: (*Motor Wheel Corp. v. Rushsam Corp.*, (6th Cir.), 92 F. 2d 129; *Solomon v. Renstorm*, (8th Cir.) 150 F. 2nd 805-808; *Ross v. Winans v. New York & Erie R.R. Co.*, 16 L.Ed. 68-71, 21 How. 88).

Should the Supreme Court permit the inferior courts below to misinterpret Petitioner's patents and claims thereof and rule on validity, invalidity, infringement and non-

infringement as had been done by both courts below when the examples 1, 2 and 3 above clearly shows that it is *"beyond"* their *"capacity"* to *"correctly interpret"* the Kinnear patents? Should the Supreme Court permit said inferior courts to illegally hold judgments against your Petitioner and for Respondent on the question of infringement of petitioner's patents when said courts below misinterprets said patent and admits it does not understand said patents?

XVI.

The District Court and the Court of Appeals both misinterpreted the definition of a *true* "jet drill bit" in a vital respect by omitting one (1) of the most important elements in a *true* jet drill bit, that is, "positioning of the fluid ducts (water courses) on the bit to direct the drilling fluid (mud) to the bottom of the well hole in order to *directly blast*" the bottom of the well hole with said drilling fluid in concentrated streams." *"No place"* in the definition of a true "jet drill bit" by said courts has the positioning of the fluid ducts been mentioned, and this is the *heart* of the *true* "jet drill bit" invention on which only Kinnear has a patent, and, is the element which is present in *ALL* of the *"accused jet drill bits"* upon which Petitioner charges infringement of his claims in his patent For example, see Plaintiff's Exhibit No. 17 set forth in Volume XVI TRANSCRIPT OF RECORD page 4594, and, Plaintiff's EXHIBIT NO: 19 set forth in Volume XVI TRANSCRIPT OF RECORD at page 4596. Should the Supreme Court permit the District Court and Court of Appeals below to hold judgment against your Petitioner and for Respondent on the question on the infringment of the *"accused jet drill bits"* when both courts below

cannot follow the *"uncontested documentary evidence"* such as set out in Petitioner's Exhibit Nos. 17 and 19 above-mentioned, and correctly interpret the evidence in said exhibits?

## XVII.

There are conflicts in the FINDINGS OF FACT of the District Court which are clearly erroneous on material issues pertaining to the interpretation of Petitioner's Patents, which are as follows:

1. There is error in Finding 65 which is in conflict with Finding 52, because Finding 65 states in part, that,

> "Each of the claims of the reissue patent, when properly construed, call for a drag type blade * * *."

To the contrary Finding 52 in part states, that,

> "There is no mention in either of the patents of drag bits, * * *."

It is obvious that irreconcilable conflict exists in the District Court's interpretation of the Kinnear patents and claims thereof between the Findings 65 and 52 which is misinterpretation of said patents.

2. The District Court misinterpreted Petitioner's Patents and clearly erred in Finding 69 which conflicts with Findings 13, 51 and 52 because Findings 69 states in part, that,

> "Claim 5, 9, 10, 12 and 14 through 19 specify that the flushing fluid issuing from the discharge nozzle is forced between the inner face of a roller cutter and the reduced portion of the bit body through channels or open spaces * * *."

To the contrary Findings 13, 51 and 52 in substance state, that,

> "On the contrary, the drilling fluid discharged from each of the water courses of the bit disclosed in the patents would hit the cutting elements."

This is irreconcilable conflict between Finding 69 which states that the fluid discharges in clear open spaces, whereas, Findings 13-51 and 52 all state that the fluid discharges "onto" the cutters.

3. The District Court misinterpreted Petitioner's Patents and clearly erred in Finding 87 which is in conflict with Finding 13, 51 and 52, because Finding 87 states in part, that,

> "The bit is provided with two pairs of water courses, one pair directing streams of drilling fluid onto the tops of the outer roller cutters, while the other pair directs the stream of drilling fluid onto the bottom of the hole between the cutting edges. Therefore, the Hughes discloses all of the essential elements arranged in the same relation and performing the same function as the bit disclosed and claimed in the Kinnear Patent No. Re. 23,416."

The above in Finding 87 is in conflict with Findings 13, 51 and 52 for example, Finding 52 states in part, that,

> "There is no suggestion in either of the patents that any of the water courses should be so positioned that the drilling fluid issuing therefrom would be discharged so as to miss the cutters and strike directly onto the bottom of the hole. On the contrary the drilling fluid discharged from each of the water courses of the bit disclosed in the patents would hit the cutting elements."

The above quotations show irreconcilable conflict between Finding 87 and Findings 13, 51 and 52, and, is a clear misinterpretation of the Kinnear Patents.

Should the Supreme Court permit the District Court to rest is decision on these conflicting interpretations of Petitoner's patent on material issues that affect the questions of validity and infringment of Petitioner's patents, which are false and untrue, and, thereby hold an illegal judgment based thereon against your Petitioner and for Respondent denying Petitioner due process of law on the interpretation of its patent and thereby refuse Petitioner the relief requested in its complaint charged against Respondent?

## XVIII.

There is conflict of opinion within the opinion's of the Court of Appeals below, because in said Court's opinion, entered September 22, 1958 set forth in Appendix B-1, page 65 infra, where said Court of Appeals misinterpered petitioner's patents No. 23,416 and *"Measures"* the *"Validity"* of said patent by what is *"shown"* in the patent and incorrectly held;

> "The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the *"form"* of combination bit *"shown"* in the patent." (Emphasis ours)

The above is the *"wrong criteria and tests"* on what is *"shown"* in petitioner's patent to determine validity of petitioner's patent, whereas, the law particularly sets out that which is *"claimed"* in the patent *"measures"* the *"invention"* and that the claims rather than the specifica-

tion or drawings *"shown"* control in determining the scope of the patent from which the *"validity"* of said patent, is determined, as was held in the case of *Brown v. Brock*, (4th Cir., 1957) 240 F. 2d 723-28; Citing Supreme Court cases, *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271-77, 69 S.Ct. 535, 93 L.Ed. 672; *Milcor Steel Co. v. George A. Fuller*, 316 U.S. 143, 62 S.Ct. 969, 86 L.Ed. 1332; *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 58, S.Ct. 899, 82 L.Ed. 1402.

The Court of Appeals below in its Per Curiam Opinion entered April 30, 1959, set forth in APPENDIX B-2, page 73 infra, held,

> "In our opinion, the claims themselves of the reissue patent are limited to a combination rotary drilling tool, bit, or drill, and the patent has not been infringed by Appellee."

There is conflict of opinion between the quote above in the September 22, 1958 opinion B-1, and the quote above in the April 30, 1959 PER CURIAM Opinion B-2, because a patentee cannot construe his claims with reference to his drawings, (Fifth Circuit's opinion, B-1, *"form shown"*); in order to escape invalidity, and then in the *"next breath"* seek to disregard the drawings and specification, (Fifth Circuit's opinion B-1, *"form Shown"*), in order to spell out infringment. The question of law on the above opinions of said Court of Appeals clearly sets out that the Court of Appeals for the Fifth Circuit *"cannot"* legally use *"different"* Criteria and Tests for validity and infringement in the *"same interpetation"* of a patent, as has been done by the Court of Appeals below in this instant case, as the law is well settled on this subject in the following cases cited: *Wire Tie Mach. Co. v.*

*Pacific*, (9th Cir. 1939), 107 F. 2d 54; *Emery Industries, Inc. v. Schumann*, (7th Cir. 1940), 111 F. 2d 209; *Western States Mach. Co. v. S. S. Hepworth Co.*, (2nd Cir. 1945), 147 F. 2d 345, cert. 325 U.S. 873, 89 L.Ed. 1881.

The Supreme Court should use its POLICE POWERS, and RIDE HERD on the Court of Appeals for the Fifth Circuit and force said Court to "OBEY" the rules of law and use the *"same"* correct *"criteria"* and *"tests"* on the validity and infringements of your petitioners patent No. 23,416, instead of a *"different"* criteria and tests in ruling on the question of validity and infringement of said patent, as the Court of Appeals below used in illegally holding;

"* * * the patent has not been infringed by Appellee."

Should the Supreme Court allow and permit the Court of Appeals below to misinterpet petitioner's patents, make the *"wrong"* Criteria and Tests, on validity of said patent No. 23,416, on what is *"shown"* instead of the *"Correct"* Criteria and Tests of what is *"claimed"* in petitioner's said patents? Should the Supreme Court allow and permit the Court of Appeals below to rule on the validity, or attempt to rule on the validity of petitioner's patent No. 23,416 on the *"form shown"* and in the *"next breath"* pass on non-infringement of petitioner's patent by Appellee in holding the patent has not been infringed by Appellee? The Supreme Court should resolve the *"conflict"* within the opinions of the Court of Appeals below where said Court used the *"incorrect"* Criteria and Tests of what is *"shown"* to determine the question of validity of petitioner's patents in suit, and, what is claimed in petitioner's patents in suit to determine non-infringement of petitioner's said patents, as has been *"incorrectly"* and *"illegal-*

*ly*" done by the Court of Appeal below in this instant case?

## Constitution and Statutes Involved

The Constitutional and Statutory provisions involved are the Constitution of the United States, AMENDMENT V, Due Process of Law Clause, set forth in APPENDIX G-1, infra p. 130; Title 28, U.S.C. Sec. 455, set forth in APPENDIX G-2, infra p. 130; Rule 60 (b) FEDERAL RULES OF CIVIL PROCEDURE, set forth in APPENDIX G-3, infra p. 131; Title 28 U.S.C. Sec. 1254 (1), set forth in APPENDIX G-4, infra p. 132; Constitution of the United States, ARTICLE I, Sec. 8, set forth in APPENDIX G-5, infra p. 132; MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE, Title 15 U.S.C. Sec. 1, 2 and 15, Title 28 U.S.C. Sec. 1337, Title 28 U.S.C. Sec. 1338 (a) and (b), Title 28 U.S.C. Sec. 1400 (b), set forth in APPENDIX G-6, infra p. 133; REVISED CIVIL STATUTES OF THE STATE OF TEXAS (VERNON'S) Limitation of Personal Actions Art. 5526 (5687-98, 3354-63, 3203-12), set forth in APPENDIX G-7, infra p. 136; REMEDIES FOR INFRINGEMENT OF PATENT, AND OTHER ACTIONS, Title 35 U.S.C. Sections 281, 282, 283 and 284, set forth in APPENDIX G-8, infra p. 137.

## Statement

The Original Transcript of Record in this case and the Supplemental Transcript of record attached thereto at the end of Volume XVI are part of the record before the

Supreme Court in Case No. 435, October Term, 1959. Additional Transcript of Record in one unnumbered volume of 228 pages containing proceedings made of record in the Court of Appeals below and is attached to case No. 1131, Misc. docketed May 15, 1961 in the Supreme Court. Attached to and filed with this Petition for Writ of Certiorari is SECOND SUPPLEMENTAL TRANSCRIPT OF RECORD containing 8 pages. All of the above record is requested to be incorporated in and made a part of this instant Petition for Writ of Certiorari in the Supreme Court. From which this Petition for Writ of Certiorari is made.

Petitioner's Complaint was filed against Respondent on April 6, 1953 and was amended by First Amended Original Complaint filed Jan. 14, 1955 (R.I. 6) on which the case was tried. The jurisdiction of the District Court was invoked because the case arises under the Patent, Unfair Competition and Monopoly or Anti-Trust Laws of the United States. (U.S.C. Title 35, Sections 281 and 283; Title 28, Sections 1337, 1338 (a) and (b), and 1400 (b); Title 15, Sections 1, 2 and 15; and, Art. I, Sec. 8 of The Constitution of the United States. Respondent filed its Amended Answer and Supplemental Answer on Jan. 25, 1955 (R. I, 47). The case proceeded to trial on its merits on its merits on Feb. 28, 1955 and was concluded on April 1, 1955 (without written opinion) and Findings of Fact and Conclusions of Law were entered on Sept. 28, 1956 (R. XVI, 4270) and Final Judgment of the District Court was entered Oct. 10, 1956 (R. XVI, 4323). Notice of Appeal made to The United States Court of Appeals for the Fifth Circuit and filed Jan. 30, 1957 (R. XVI, 4366) on which Argument and Submission was had before said Court on April 29, 1958 (R. XVI, 4400)

Opinion of said court filed Sept. 22, 1958 (R. XVI, 4410). Order to Extend Time to File Petition and Brief for Rehearing entered Sept. 29, 1958 (R. XVI 4413). Another Order to Extend Time to file Petition and Brief for Rehearing entered. 1958 (R. XVI, 4415), Petition for Rehearing filed Dec. 12, 1958 (R. XVI, 4416), Petitioner Appellant's Brief in Support of Petition for Rehearing filed Dec. 12, 1958 (R. XVI, 4423), Respondent's Brief for Appellee on Appellant's Petition for Rehearing filed Jan. 29, 1959 filed at the request of the court (R. XVI, 4547), Petitioner's Reply Brief of Plaintiff-Appellant in Support of Petition for Rehearing filed Feb. 19, 1959 (R. XVI, 4572), OPINION OF REHEARING filed April 30, 1959 (R. XVI, 4639), Order Denying Rehearing filed April 30, 1959 (R. XVI, 4641), Order Staying Mandate filed May 15, 1959 (R. XVI, 4645), Motion For Leave to File Second Petition for Rehearing filed May 21, 1959 (R. XVI, Supp. Tr., 1), Second Petition for Rehearing Filed July 2, 1959 (R. XVI, Supp. Tr. 3), Order Permitting Petition for Rehearing to be Filed and Denying same filed July 2, 1959 (R. XVI, Supp. Tr. 34), Order Staying Mandate Filed July 14, 1959 (R. XVI, Supp. Tr. 38), and AFFIDAVIT with Exhibits showing "commericial success" of Petitioner's Patents and showing Respondent, et al, with Perjury and Unclean Hands in this case (pages 1 to 23) presented June 18, 1959 as per Clerk's Certificate dated August 14, 1959 (R. XVI attached to Supp. Tr. -). From which this Petition for Writ of Certiorari is made.

The references to the pages in the Transcript of Record in this paragraph refer to the 228 page Transcript of Record filed with and docketed with Case No. 1131, Misc., October Term 1960. Petitioner's MOTION TO OPEN

CASE, etc. dated December 3, 1960 set forth in APPENDIX D-1 thereto, infra, p. 73 and presented to the United States Court of Appeals for the Fifth Circuit requesting leave to file said motion as of December 5, 1960 which said court acknowledged jurisdiction and ordered said motion filed and entered of record in said court on December 27, 1960 by said order set forth in APPENDIX A-1 thereto, p. 1 and, hereto, infra, p. 61-63 in said court's order of Dec. 27, 1960 Respondent was granted leave to file Response to said motion which Response was filed of record in said court on Jan. 26, 1961 set forth in APPENDIX E-1 thereto, infra, p. 190-193; Petitioner in said order of Dec. 27, 1960 was granted leave to file brief which was filed of record in said court on Feb. 24, 1961 set forth in APPENDIX D-2, thereto; infra, p. 121; Said court acted on Petitioner's said MOTION TO OPEN CASE, etc., dated Dec. 3, 1960 presented to said Court on Dec. 5, 1960 and made Final Order thereon on March 15, 1961 set forth in APPENDIX A-2 thereto p. 9, and hereto, infra, p. 63. Petitioner tendered to said court on March 4, 1961 MOTION ON NEWLY DISCOVERED FRAUD, etc., dated March 3, 1961 set forth in APPENDIX F-1 hereto, infra, p. 216, and, Court of Appeals refused petitioner leave to file said motion on March 15, 1961 by Final Order set forth in APPENDIX A-3 thereto p. 4, and hereto, infra, page 64. From which this Petition for Writ of Certiorari is made.

The reference to the pages in the Transcript of Record in this paragraph refer to the 8 page SECOND SUPPLEMENTAL TRANSCRIPT OF RECORD certified by the Clerk of the Court of Appeals on July 13, 1961 which is presented with this instant Petition for Writ of Certiorari in this case. The SUPPLEMENTAL OPINION

of the Court of Appeals entered and dated May 17, 1961 set forth in record as APPENDIX H-1, infra p. 1, and hereto, infra p. 139, and, was voluntarily made by said court within 5 days from Petitioner's "MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF CERTIORARI and/or MANDAMUS and/or PROHIBITION, etc." docketed May 15, 1961 as case No. 1131, Misc. in the Supreme Court; CORRECTED JUDGMENT OF THE COURT OF APPEALS entered and dated May 17, 1961 set forth in APPENDIX H-2, infra p. 142, was voluntarily made by said court in view of its SUPPLEMENTAL OPINION of said same date and without the urging or request of Petitioner. The SUPPLEMENTAL OPINION and CORRECTED JUDGMENT of the Court of Appeals has further complicated this case, and, created conflicts of opinions and judgments not only with that of the District Court but also within its own opinions and Judgments. From which this Petition for Writ of Certiorari is made.

as set forth in the Questions Presented herein

The Appellate Court below erroneously affirmed the Judgment of the District Court and erroneously entered its Judgment thereon for Respondent, and, would not pass upon vital issues in this case, some of which involve Federal Laws and Federal Constitutional questions which should be settled by The Supreme Court. The Supreme Court should resolve the conflicts which clearly appear within each of the decisions and judgments of both courts below. The Supreme Court should resolve the conflicts between the District Court below and the District Court for the District of Columbia who have made conflicting decisions on the questions of invention and validity of Petitioner's Patents, which issues are left unsettled because

the Appellate Court below "could not satisfy itself as to invention and validity of Petitioner's Patents," and, failed and refused to pass upon same, but yet, affirmed the judgment of the District Court below holding Petitioner's Patents invalid and void, which said Court of Appeals now trys to and illegally does change in its corrected opinion and judgment which now further places the validity of petitioner's patents in "*jeopardy*," which is also one of the "*conflicts*" within the decisions and judgment of the Appellate Court below. The Supreme Court should settle the conflicts on applicable questions of law pertaining to material issues in this case on which questions of law both courts below are in conflict with settled law of other Appellate Courts and The Supreme Court, and, recent former decisions of the Court of Appeals for the Fifth Circuit in order to bring about uniformity of decision thereon whereby the correct criteria and tests of the law shall be applied on such issues amongst the several inferior courts.

## Reasons for Granting the Writ

### I

The Court of Appeals knowingly denied your Petitioner a fair trial in a fair tribunal because said court in its SUPPLEMENT OPINION set forth in APPENDIX H-1 and CORRECTED JUDGMENT set forth in APPENDIX H-2 both dated May 17, 1961 had before said court in the record undisputed and *uncontradicted documentary evidence* "Prima facie" on their face showing that the Judgment set forth in APPENDIX B-5 of the District Court to be fraudulent and illegal because of the substantial interest of the District Judge Lamar Cecil and/or

his wife owning shares of the capital stock in Respondent corporation, was doing business with Respondent in the oil and gas properties owned by District Judge Lamar Cecil and/or his wife and operated by Respondent Corporation, owned shares of the capital stock of other oil and gas companies which companies and their assets would have been affected by Judgment for Petitioner against Respondent, and, District Judge Lamar Cecil owned capital stock in Coastal Tool Company and was on the Board of Directors thereof of which Respondent Corporation was a *"principal customer* and *doing business"* with said Coastal Tool Company. All of the above-mentioned substantial interests of District Judge Lamar Cecil and/or his wife Mary Reed Cecil was owned by them before, during and after the trial and proceedings in this instant case. All of said *"undisputed"* and *"uncontradicted"* documents above-mentioned are of record in APPENDIX D-1 being Exhibits Nos. 1 thru 12, APPENDIX D-2 being Exhibits Nos. 13 thru 25, and, the stock certificates of Respondent Corporation representing Capital Stock in Respondent Corporation owned by District Judge Lamar Cecil and/or his wife Mary Reed Cecil and being Exhibits attached to APPENDIX E-1, all of which Exhibits above are attached to and made a part of Case No. 1131, Misc. docketed in the Supreme Court May 15, 1961 and, said EXHIBITS are incorporated in this present petition the same as if Written herein or attached hereto. All of the documents mentioned represent substantial interests owned by District Judge Lamar Cecil and/or his wife, Mary Reed Cecil before, during and after the trial and proceedings in this case in which Judge Lamar Cecil acted as District Judge in this case in violation of Title 28 U.S.C. Sec. 455 which renders the judgment of the District Court

fraudulent, illegal and void because your Petitioner was denied a fair trial in a fair tribunal and denied *"due process of law"* in violation of the V Amendment to the Constitution of the United States. The Court of Appeals had the record containing the above mentioned undisputed and uncontested documents before said court and thereby *"knowingly"* granted a fraudulent SUPPLEMENTAL OPINION set forth in APPENDIX H-1 and fraudulent CORRECTED JUDGMENT set forth in APPENDIX H-2 both dated and entered of record May 17, 1961, when said court should have, rendered and entered its Opinion and Judgment for Petitioner against Respondent for the relief requested in the MOTION TO OPEN CASE, etc., dated Dec. 3, 1960 and ordered entered of record Dec. 27, 1960 by Order set forth in APPENDIX A-1 and entered of record on Dec. 27, 1960. The said Court of Appeals and the judges thereof are in *"violation"* of their *"oath"* of office and in *"dereliction"* of their *"duty"* who knowingly and fraudulently granted said fraudulent and illegal supplemental opinion and corrected judgment of May 17, 1961 for Respondent and against your Petitioner, and, the Supreme Court should exercise its Appellate jurisdiction and *strike down* said illegal and fraudulent opinions and judgments of all of the inferior courts below and grant to your petitioner of the relief requested.

## II

The Supreme Court should exercise its appellate jurisdiction to entertain, review and grant petitioner relief in this case because this is a case of first impression on the proposition of a judge of a United States Court concealing his substantial interests in a case and who was so related to and, connected with a party litigant in said case, in

which case, said judge sat in the trial and proceedings of said case and practiced fraud upon all courts including the Supreme Court and the losing litigant in said case without their knowledge of said judges' substantial interests, relationship or connections as was done in the instant case by Judge Lamar Cecil, United States District Judge in violation of 28 U.S.C. Sec. 455, which proposition of federal law should be settled by the Supreme Court because the Court of Appeals has failed and refused to give force and effect to said federal statute 28 U.S.C. Sec. 455 and grant relief to your petitioner thereon when the record before said Court of Appeals shows prima facie on its face in view of said federal statute fraud was practiced by said Judge Lamar Cecil upon all Courts in this case and upon your petitioner as set forth in petitioner's motion APPENDIX D-1 with attached Exhibits Nos. 1 thru 12 and is set forth in petitioner's brief APPENDIX D-2 with attached Exhibits Nos. 13 thru 25

III

The Supreme Court should exercise its appellate jurisdiction to entertain, review and grant petitioner relief in this case because this is a case of first impression of a judge of a United States Court and a successful party litigant each knowingly concealing substantial interests of said judge in a case, in which case, said judge sat in the trial and proceedings in said case and practiced fraud upon all courts including the Supreme Court and the losing litigant in said case without their knowledge of said judge's substantial interest as was done in the instant case by Judge Lamar Cecil, United States District Judge in violation of 28 U.S.C. Sec. 455, which proposition of federal law should be settled by the Supreme Court, be-

cause the Court of Appeals failed and refused to give force and effect to said federal statute 28 U.S.C. Sec. 455 and grant relief to your petitioner thereon, when the record below said Court of Appeals shows "prima facie" on its face in view of said federal statute, fraud was practiced by said Judge Lamar Cecil and respondent its executives, agents and attorneys upon all courts in this case and upon your petitioner as set forth in petitioner's motion APPENDIX D-1 with attached Exhibits Nos. 1 thru 12 and as set forth in petitioner's brief APPENDIX D-2 with attached Exhibits Nos. 13 thru 26, and, Motion on Newly Discovered Fraud, APPENDIX E-1, as set forth page 216 of the Transcript of the Record docketed in Case No. 1131, Misc., October Term, 1960 in The Supreme Court and incorporated as a part of this petition.

## IV

All judgments in this case for respondent and against petitioner are fraudulent because Judge Lamar Cecil, United States District Judge acting as Judge and/or his wife Mary (Reed) Cecil had substantial interests in this case and was so related to and connected with party respondent in this case to disqualify said judge under 28 U.S.C. Sec. 455 from sitting in the trial and proceedings in this case, which said disqualifying substantial interests are as follows; and are more particularly set out in petitioner's motion as set forth in APPENDIX D-1 in Point 1, paragraphs 1 thru 12 thereof, viz:

1. Judge Lamar Cecil and/or his wife, Mary (Reed) Cecil owned substantial shares of capital stock of respondent, (Exhibits Nos. 6 and 9 attached to APPENDIX D-1, and, stock certificates attached to respondent's RESPONSE in APPENDIX E-1);

2. Owned shares of capital stock of respondent and received dividends thereon (Exhibits Nos. 6, 9 and 23 attached to APPENDIX D-1 and D-2);

3. Owned Capital stock of Standard Oil Company (New Jersey) parent owner company of respondent (Exhibits Nos. 1 and 9 attached to APPENDIX D-1);

4. Connected with and doing business with respondent and owned substantial oil, gas and mineral interests and/or royalty interest in mineral in land with respondent (Exhibits Nos. 1, 2, 4, 5 and 9 attached to APPENDIX D-1);

5. Connected with and doing business with respondent and owned substantial oil, gas and mineral interests and/or royalty interest in minerals in land with respondent upon which respondent operated wells some of which were drilled with the accused infringing drill bits to unjustly enrich respondent and Judge Lamar Cecil (Exhibits Nos. 1, 2, 4, 5 and 9 attached to APPENDIX D-1);

6. Owned Substantial undivided oil, gas and mineral interests and/or royalty interests in minerals in real estate with respondent (Exhibits Nos. 1, 2, 4, 5 and 9, attached to APPENDIX D-1);

7. Owned shares of capital stock of Coastal Tool Company and was on the Board of Directors thereof which Coastal Tool Company did much business with respondent (Exhibits Nos. 7; 8 and No. 1 on page 5 thereof attached to APPENDIX D-1);

8. Owned substantial interests in the capital stock of many major oil and gas companies which would have been affected by and concerned in interest with petitioner's patent in suit had Judge Lamar Cecil held petitioner's patent valid as per District Court Finding of Fact 86 (150 F. Supp. 143) as set forth in APPENDIX B-4) Exhibits Nos. 1 on page 4 and 5 attached to APPENDIX D-1);

9. T. S. Reed, Father-in-law of Judge Lamar Cecil who owned substantial interest in capital stock of respondent and other major oil and gas companies and received dividends thereon which was protected by judgment against petitioner (Exhibit No. 9 attached to APPENDIX D-1);

10. Randolph C. Reed, Brother-in-law of Judge Lamar Cecil who owned substantial interests in capital stock of respondent and other major oil and gas companies and received dividends thereon which were protected by judgment against petitioner (Exhibit No. 9 attached to APPENDIX D-1);

11. Owned capital stock of respondent and received cash and stock dividends thereon during the time or times respondent committed the wrongful acts charged by petitioner against respondent in the claims of the complaint for infringement of petitioner's patent, violation of confidential relationship, unjust enrichment, unfair competition and unfair trade practices, and violation of anti-trust laws; (Exhibits Nos. 6 and 9 attached to APPENDIX D-1) and,

12. Owned substantial oil, gas and mineral interests and were doing business with respondent in selling oil and gas produced from wells operated by respondent from lands covering said oil, gas and mineral interests (Exhibits Nos. 1; 2, 5 and 9 attached to APPENDIX D-1).

Your petitioner has set out above twelve (12) different disqualifying substantial interest, relationship and business connections of Judge Lamar Cecil and/or his wife Mary Reed Cecil with respondent, any one of which disqualified him from sitting on the trial or any proceedings in this case which said Judge, Respondent, its executives, agents and attorneys all had prior knowledge and concealed same

from your petitioner and all courts in this case, which denied your petitioner a fair trial in a fair tribunal, which is a high handed and *"flagrant violation"* of petitioner's rights in this case. Illegal practices of a judge refusing to adhere to "due process of law" such as Judge Lamar Cecil's failure to heed the statute 28 U.S.C. Sec. 455, was struck down by the Supreme Court in the case of Re Murchison 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623, at page 136 held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. * * * But to perform its high function in the best way 'justice must satisfy the appearance of justice'." (Offutt v. United States, 348 U.S. 11, 99 L. Ed. 11, 75 S. Ct. 11)

The proposition of law in our jurisprudence that no judges shall sit in a case where he has an interest is well stated in the *Coltrane et al. v. Templeton et al.*, (4th Cir.) 106 F. 376-78, at page 376 held:

> "There can be no doubt that no one should sit in a cause in which he or those with whom he is connected, had an interest. It is unnecessary to cite authority for this, as it is a principle embedded in our jurisprudence."

Writ of Certiorari is applicable under 28 U.S.C. Sec. 1254(1) to force the Court of Appeals and the judges

thereof to vacate and set-aside the judgments against petitioner because of Judge Lamar Cecil's interests, relationships and business connections in this case. In Re *Honolulu Cnoonsol. Oil Co.*, (9th Cir.), 243 F. 348-53, at page 353 held:

> "* * *, the judge is sufficiently related to the litigation to impel the conclusion that he is concerned in interest, and therefore should not sit."

V.

The Supreme Court should entertain, review and grant relief on the requested writ because of the opinion of the U.S. Court of Appeals for the Fifth Circuit and the Judges thereof, denied petitioner "due process of law" in violation of the V amendment of the Constitution of the United States because said court and said judges thereof, could not satisfy themselves as to the validity of the claims of petitioner's patent, yet, affirmed the judgment of the district court holding petitioner's patent "invalid and void". LEGAL ANARCHY has been practiced by said Court of Appeals and its judges against your petitioner by holding said patent invalid, but yet they could not satisfy themselves as to the validity of said patent. The Supreme Court should exercise its appellate jurisdiction and strike down the opinion and judgment of said Court of Appeals and said District Court and preserve the validity of petitioner's patent, because if the inferior courts of the United States are allowed and permitted to hold patents invalid when they cannot *"satisfy themselves as to the validity of said patents"*, such holding if allowed to stand will lay a predicate to destroy the patent laws and system of the United States which is of

great public importance and will result in public injury to the people of the United States, as well, as damage and injury to your petitioner.

VI.

The United States Court of Appeals and the Judges thereof in their Orders of Dec. 27, 1960 set forth in APPENDIX A-1 arbitrarily changed Petitioner's MOTION TO OPEN CASE, etc., set forth in APPENDIX D-1 to treat said motion as a motion under Rule 60(b) of the Federal Rules of Civil Procedure, whereas in fact, said motion is a motion averred and alleged purely in equity and does not and cannot be interpreted to come under said written Rule 60(b) because petitioner had no knowledge of or did not discover the facts of fraud of Judge Lamar Cecil or his disqualification to sit as the District Judge in this case under 28 U.S.C. Sec. 455 until approximately 3 years, 7 months and 4 days after judgment which is far beyond the one (1) year period provided in said written Rule 60(b). Which facts of fraud and said disqualification of said Judge Lamar Cecil as set forth in Petitioner's Motion to the Court of Appeals and in this Petition was with prior knowledge concealed by said Judge Lamar Cecil, Respondent, its executives, agents and attorneys from your petitioner and all courts in this case including the Supreme Court, and said Court of Appeals and the judges thereof in order entered March 15, 1961 as set forth in APPENDIX A-2 further arbitrarily and illegally enforced its will irrespective of the facts and treated petitioner's said motion as a Rule 60(b) motion and denied petitioner the equitable relief as set forth and prayed for in petitioner's said motion. By said court's orders of December 27, 1960 and of March 15, 1961 said

court and its judges has so far departed from the accepted and usual course of judicial proceedings by this uncalled for and arbitrary action to call for an exercise of the Supreme Court's power of supervision, and, by said arbitrary action said court and its judges has exceeded their jurisdiction and usurped petitioner's rights by changing petitioner's motion into something different than what it really contains by merely labeling it a FRCP 60(b) motion to unlawfully uphold fraudulent judgments in this case for respondent against petitioner to defeat petitioner's rights in equity to which it is entitled. No federal judge of the inferior courts should have the right to change a litigant's complaint or motion and violate the "due process of law" clause of the Vth Amendment of the Constitution of the United States and defeat a litigant's rights as has been done by the Court of Appeals against petitioner in this case which is all the more reason why the Supreme Court should take jurisdiction since a jurisdictional question has been raised which calls for its appellate review.

## VII.

Judge Lamar Cecil, Respondent, its executives, agents, and attorneys not only practiced fraud as set forth in, Petitioner's Motion to the Court of Appeals and in this Petition upon your petitioner but upon all courts in this case including the United States Court of Appeals for the Fifth Circuit who has the power and the duty under the exception and saving clause of Rule 60(b) FRCP, where fraud is practiced on the court to void the fraudulent judgment obtained in said court and to direct the District Court to void its fraudulent judgment in this case, which said Court of Appeals has failed and refused to do, in fact, by its Orders of March 15, 1961 has upheld the

fraud practiced upon all courts in this case in direct conflict and violation of the rule of law laid down by the Supreme Court in the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 237-71. The Supreme Court should use its appellate jurisdiction to force the Fifth Circuit to do in principle what it forced the Third Circuit Court to do in the *Hazel-Atlas* case supra where fraud was practiced on the courts as in this instant case to bring about uniformity of law in the inferior courts of the United States.

VIII.

The Supreme Court should exercise its appellate jurisdiction and prevent the Court of Appeals from "*knowingly upholding, condoning* and *perpetrating*" the fraudulent judgment of the District Court and the fraudulent judgments of the Court of Appeals for Respondent and Against your Petitioner. Under the circumstances the Court of Appeals is practicing personal bias and prejudice for Respondent and against your Petitioner in violation of due process of law of the V Amendment to the Constitution of the United States amounting to an unfair trial in an unfair tribunal, and the Supreme Court should grant petitioner a fair trial and give to petitioner the relief requested; because of the substantial interest, relationship and connection of District Judge Lamar Cecil with Respondent corporation in view of the undisputed and uncontradicted documents in the record before said court in this case as set forth in paragraph IV herein under reasons for granting the writ.

IX.

The Court of Appeals has conflicts within its own opin-

ions and judgments in this case as set forth in APPENDIX B-1, B-6, H-1 and H-2 because said Court of Appeals cannot satisfy itself as to the validity of Petitioner's Patents which is a legal question, yet, said Court of Appeals made is SUPPLEMENTAL OPINION and modified the judgment of the District Court by *"striking therefrom"* that part which declares that U. S. Patent No. Re. 23,416 is invalid and void, yet, the Court of Appeals writes into its original Opinion APPENDIX B-1 and admits that it *"does not understand* and *cannot interpret"* Petitioner's Patent to determine validity of said patent. Therefore, it is *impossible* for said Court of Appeals to pass upon the validity of Petitioner's patent and strike down the Judgment of the District Court holding said patent invalid and void because said Court of Appeals admits that it is beyond their capacity because the *issues are so far flung and broadly drawn* they cannot satisfy themselves as to the validity of Petitioner's patent. It is therefore, an impelling reason why the Supreme Court should grant this writ as Petitioner is entitled to appellate review which Petitioner has not been able to obtain in the Court of Appeals because of the *"incapacity"* of the Court of Appeals to conduct an *"intelligent review"* of the question of the validity of Petitioner's patent since the Court of Appeals cannot resolve the conflict in its own opinions and judgments as set forth in Question Presented XI.

## X.

The Court of Appeals has *disregarded* its duty and *obligation* by failing and refusing to review Petitioner's point raised on appeal before said court on the legal question as to the validity of Petitioner's patent. The question of validity of Petitioner's patent was originally raised in

the Respondent's Answer to Petitioner's Complaint, and urged by said Respondent and ruled upon by the District Court who held the Petitioner's Patent invalid and void. Petitioner, timely set up on appeal before said Court of Appeals a point in its appeal requesting said Court of Appeals to review the judgment of the District Court holding Petitioner's Patent invalid and void. Said Court of Appeals *failed* and *refused to rule* on the validity of Petitioner's patent on appeal before it and *still fails* and *refuses* to do so in *violation* of the rule laid down by the Supreme Court in the case of *Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 158, 95 L. Ed. 163, which case held:

> "It is worth emphasis that every patent case involving validity presents a question which requires reference to a standard written into the Constitution."
>
> "The Court now recognizes what has long been apparent in our cases: that it is the *"standard of invention" that controls*. That is present in every case where the validity of a patent is in issue. *It is that question which the Court must decide*. No "finding of fact" can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case. We speak with final authority on that constitutional issue as we do on many other." (Emphasis ours)

The Court of Appeals by its refusal to pass upon the validity of Petitioner's Patents on appeal before it violates the rule of law laid down by the Supreme Court in the above-mentioned case, and also, violates Art. I, Sec. 8 and Amendment V of the Constitution of the United States. Under these circumstances your Petitioner *has sought* but

*not received* any *appellate review* of the issue of the validity of Petitioner's Patents and Petitioner requests the Supreme Court to grant this writ and review the issue of the validity of Petitioner's Patents because the Court of Appeals has *"failed"* and *"refused" to do its duty"*, and grant Petitioner due process of law as set out in Question Presented XII, which is violation of the U.S. Constitution Amendment V. Which goes to the questions of Jurisdiction and power of the Court of Appeals to remove this issue of the validity of Petitioners Patents from this case.

XI.

The Court of Appeals had no valid reason or right to affirm the judgment of the District Court in its original opinion APPENDIX B-1 and its SUPPLEMENTAL OPINION set forth in APPENDIX H-1 and CORRECTED JUDGMENT set forth in APPENDIX H-2. The District Court in its judgment decreed that,

> "2. That U. S. Patent No. Re. 23,416 has not been infringed by defendant, Humble Oil & Refining Company;"

The Court of Appeals admits that the issues are *"so far flung"* and *"broadly drawn"* that they *"cannot satisfy themselves"* as to the validity of Petitioner's patents. If said Court of Appeals *"cannot interpret"* petitioner's patent to *"satisfy themselves"* as to the validity of said patent, then it would be impossible for said Court of Appeals to interpret Petitioner's Patent and affirm the Judgment of the District Court that Petitioner's patent has not been infringed by Respondent. The Question Presented XIII presents the question clearly that if the Court of Appeals cannot interpret the patent on the question of validity because it is beyond their capacity it would be *"impossible"* for the *same* Court using the *same* Patent to determine

the question of infringement of Petitioner's patent, as the Court of Appeals would have to use the *same* patent of Petitioner as a *"yardstick"* to determine the question of infringement since the structure in petitioner's patent must remain static and bear a clear interpretation from its specification and claims on both issues of validity and infringement which is a question of law as to the interpretation of the legal instrument contained in Petitioner's patent.

The Supreme Court *has the duty* to set the Court of Appeals for the Fifth Circuit straight on the question of law, that the said Court of Appeals *"cannot* profess *ignorance"* on the interpretation of petitioner's patent 23,416 in suit pertaining to the validity of said patent, by being *unable* to *satisfy* themselves on the validity of petitioner's patent and know *whether* or *not* said patents *define invention"* in the claims of said patents; and, the same said Court of Appeals claim to be *"intelligent"* on the interpretation of petitioner's patent and incorrectly and illegally decide respondent has not infringed the claims of Petitioner's patent No. 23,416.

The above is a law question of *"first impression"* and should be *"correctly enunciated"* by The *Supreme Court* for direction of the inferior Courts of The United States, and, more particularly the Court of Appeals for the Fifth Circuit, all of which is a *"most"* IMPELLING reason why the Supreme Court should grant this writ.

## XII.

There is a conflict of decision within the opinions and judgments of the Court of Appeals and those of the District Court, and, conflict solely within the decisions of the opinion and judgments of the Court of Appeals on

the Disposition of Petitioner's claims and charges in the complaint against Respondent. The Court of Appeals made *"wholesale slaughter"* of Petitioner's claims and charges in Petitioner's Complaint against Respondent on the claims of Violation of Confidential Relationship, Unjust Enrichment, Unfair Competition and Unfair Trade Practices, and violation of the Anti-Trust laws by one *broad sweep of the knife by holding*, that:

> "Further, we agree with the DISPOSITION by the District Court of the claims other than for patent infringement."

Yet, the Court of Appeals found that the District Court misinterpreted Petitioner's Patents and wrongfully DISPOSED of Petitioner's claims charged against Respondent as set forth in Question Presented XIV (See District Court FINDING OF FACT 3 APPENDIX B-4), and, by its SUPPLEMENTAL OPINION set forth in APPENDIX H-1 and its CORRECTED JUDGMENT set forth in APPENDIX H-2 entered May 17, 1961 said Court of Appeals reversed the District Court who held said patents invalid and void. In one place of said Original Opinion set forth in APPENDIX B-1 of said Court of Appeals, said Court of Appeals agreed with the District Court's DISPOSITION of Petitioner's claims charged in the complaint against Respondent by Petitioner other than patent infringement, yet on the other hand, said Court of Appeals in its SUPPLEMENTAL OPINION set forth in APPENDIX H-1 and its CORRECTED JUDGMENT set forth in APPENDIX H-2 holds that the District Court WRONGFULLY DISPOSED of Petitioner's said claims charged against said Respondent by reversing the District

Court on the question of validity of Petitioner's patents, because the District Court misinterpreted Petitioner's Patent as being invalid and void, therefore not containing invention, thereby *patched* its *entire decision* and *judgment* and held in FINDING OF FACT 3 set forth in APPENDIX B-4, that:

> "3. * * *. All these claims involve, and are inextricably connected with, the above-mentioned two Kinnear patents * * *."

The above presents an *irreconcilable conflict* between the decision of the Court of Appeals and that of the District Court and *also solely within* the decision of the Court of Appeals, and, therefore the Supreme Court should resolve these "*conflicts*" of "*decision*" and exercise its appellate jurisdiction and grant petitioner the right to review in order to make the correct DISPOSITION of Petitioner's said claims charged against Respondent, and, grant to Petitioner the relief requested as this is a question of law which the Supreme Court should determine.

## XIII.

The Court of Appeals and the District Court misinterpreted Petitioner's Patent as set out in Question Presented XV, where said Courts and particularly the Court of Appeals not only misinterpreted the distinguishing "MODE OF OPERATION" disclosed and claimed in Petitioner's patent in suit defined by the term "*directly blast*", but also, misinterpreted the question of whether or not Petitioner's Patent disclosed EROSION RESISTANT MATERIAL which is "*hard surface material*" referred to in the specification of Petitioner's patents and The Court of Appeals also, misinterpreted the claims of Petitioner's patent by writing *elements* by *implication* into said claims

which said Court of Appeals admits said elements are not included in said claims by making the clear statement *"That is true"*, nevertheless, illegally reads an element of two additional "fluid ducts" into said claims with the false reasoning that the claims do not exclude the two additional ducts on the *"theory"*, that, the two additional fluid ducts are in the specification and by analogy said two additional elements are part of the claims. Thus the Court of Appeals attempts to justify itself and *tries to commit magic* by *"twisting"* the patented claims of the Petitioner's to make them *"include something more than"*, or *"something different from"*, what the words of the claims express. The ruling law on the interpretation of the claims of a patent is that the claims measure the invention and not the specification, whereas, said Court of Appeals is incorrectly using the specification to measure the invention rather than what is clearly stated in the claims of the patent. The Supreme Court and the Fifth Circuit Court of Appeals has many times recognized that the claims measure the scope of the invention and not the specification as set forth in the cases cited in Question Presented XV, which is the requirements contained in the federal statute on this subject, which law is stated in said cases cited. The interpretation of Petitioner's patents is a question of law for the Supreme Court to determine since the District Court and the Court of Appeals misinterpreted Petitioner's patents and therefore Petitioner is entitled to a correct interpretation of said patents and their claims.

## XIV.

The District Court and the Court of Appeals both misinterpreted the definition of a *"true"* jet drill bit by

omitting the HEART of the jet drill bit invention, that is, the POSITION OF THE FLUID COURSE DUCTS ON THE BIT to direct the fluid (drilling mud) to *"directly blast"* the bottom of the well hole in the near proximity of the OUTER BOTTOM ROLLER CUTTERS OF THE BIT which is set forth in the Question Presented XVI. ALL of the "accused jet drill bits" incorporates within their tructure the arrangement and positioning of the water courses (fluid course ducts in the Kinnear patents) which is fully disclosed in the specification of the Kinnear patents by full illustration in the drawings, described in the written description thereof and claimed in the claims as his invention. The District Court and the Court of Appeals being unable to correctly interpret the structure of "accused jet drill bits" it would be *"impossible"* for said courts to rule on the question of infringement or non-infringement of the "accused" jet drill bits made and used by Respondent when compared to the inventions disclosed and claimed in Petitioner's Kinnear patent Re: 23,416. The Supreme Court should not permit the inferior courts below to hold that the "accused jet drill bits made and used by Respondent do not infringe the inventions contained in the claims of the Kinnear patent". The Supreme Court should correctly interpret the structure of the accused devices and hold that the accused devices made and used by Respondent infringes the claims of Petitioner's patent, because the structure of the said accused devices" *read directly upon the claims*" of the Kinnear Re. Patent No. 23,416, for example Exhibits P-17 and P-19, as set forth in Volume XVI TRANSCRIPT OF RECORD, pages 4593-4594 and 4595-4596 in Case No. 435, October Term, 1959, in the Supreme Court, and, incorporated in this

case being two examples of the "accused" jet drill bits matched to the claims as clearly compared with the structure defined in said claims of Petitioners patent reissue No. 23,416 and, as set out in Question Presented XVI. Thus the accused "jet drill bits" fall clearly within the claims of your petitioner's patent No. 23,416 in this case, and, the Supreme Court has *laid down* the *rule* of law which both Courts below have *"refused"* to *"follow"*, which question of law is quoted in the case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (1951), 339 U.S. 605, 70 S. Ct. 854, 855 held:

> "If the accused matter falls clearly within the claim, infringement is made out and that is the end of it."

This is an impelling reason why the Supreme Court should grant this writ.

XV.

The District Court made conflicting FINDINGS OF FACT which are clearly erroneous on material issue pertaining to the interpretation of Petitioner's Patent Re. 23,416. For example, Finding of Fact 65 is in conflict with Finding of Fact 52; Finding of Fact 69 is in conflict with Finding of Fact 13, 51 and 52; and, Finding of Fact 87 is in conflict with Finding of Fact 13, 51 and 52 as fully set forth in Question Presented XVII.

Should the Supreme Court permit the District Court to make such glaring conflicting Findings of Fact on material issues interpreting Petitioner's patent in suit and hold that Respondent by making and using the "accused" devices did not infringe the claims of Petitioner's patent, and, the Supreme Court should not allow the Court of Appeals to affirm the judgment of the District Court on the question of infringement of Petitioners' patent when the Judgment of the District Court on infringement is

based on the conflicting Findings of Fact set out above which are clearly erroneous and therefore will not support the Judgment of the District Court. The Supreme Court should resolve these conflicts set out above and *strike down* the judgment of the District Court and the affirmance of the Court of Appeals of said District Court Judgment and correctly interpret Petitioner's patent and hold the claims of said patent are infringed by the accused devices made and used by Respondent.

The decrees and judgments of the District Court and the Court of Appeals below are the *most flagrant violations* ever committed against an inventor's patents and property rights in the United States Courts, and, *it is the duty* of the Supreme Court to thoroughly review this case and give to the inventor the fruits of his invention to which he is entitled, and grant all prayed for in Petitioner's Complaint, and the relief requested in his petition.

XVI.

The Supreme Court should not allow or permit the inferior Courts below in this case to take the law into their own hands and *"disregard"* the rules of law laid down by the Supreme Court as set out in Question Presented XVIII, and *"hold opposite"* on the same question of law to the 2nd Circuit, 7th Circuit and 9th Circuit, which questions of law are set out in Question Presented XVIII. The Court of Appeal's illegal opinions and judgments below if allowed to stand against your petitioner and for respondent, will set a *"dangerous precedent"* and will set the stage to "WRECK" the patent system of the United States, *"injure* the *public"*, and, injure and damage your petitioner, and, for these REASONS the

Supreme Court should apply its "LEGAL SPURS" to the Court of Appeals for the Fifth Circuit, ride herd on said Court and make said Court of Appeals "HEED" and "OBEY" the *command* of the law laid down by the Supreme Court and other Appellate Courts as set out in Question Presented XVIII on the question of law that "NO COURT" can incorrectly use the wrong criteria and tests by that which is "*shown*" in a patent to rule on the question of validity, and, in the "*next breath*" disregard the said incorrect criteria and tests on validity of a patent and rule on the question of infringement of said patent as has been incorrectly done in this instant case.

## Conclusion

For the foregoing reasons and Affidavit, Joint Appendix with Exhibits appended in support thereof the Court is respectfully requested in all respects to grant; this Petition; Writ of Certiorari; Order the Court of Appeals to vacate and set aside its judgments and orders against petitioner and grant to petitioner appropriate relief; Order the Court of Appeals to direct the District Court to vacate and set aside its judgments and orders against petitioner and grant to petitioner appropriate relief; grant to petitioner relief for all matters and things set out and prayed for in petitioner's Complaint; Order and direct respondent to pay damages to petitioner and require respondent to reimburse petitioner for all costs, expenses and reasonable attorney's fees incurred by petitioner; and, costs of suit due to respondent's fraudulent acts and unclean hands practiced against petitioner causing the abortive trial and proceedings in this case; and, that the Court grant petitioner such other and further relief as

the equity of the case may require and to the Court may deem meet and just, and it is respectfully requested that your petitioner be permitted by the Court to present this case on oral arguments.

Respectfully submitted,

WILLIAM E. KINNEAR
Suite 419-21 American National Bank Building, Beaumont, Texas
*Counsel for Petitioner*

Dated: August 12, 1961.

## Certificate of Counsel

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, Petitioner in the above entitled case, hereby certifies that the above and foregoing, and, ~~JOINT~~ APPENDIX and referenced TRANSCRIPT OF RECORD WITH EXHIBITS are presented in good faith, and not for the purpose of delay, restricted to the grounds therein specified but in the opinion of counsel, well founded in law and proper to be filed herein.

WILLIAM E. KINNEAR

## Proof of Service

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 12th day of August, 1961, I served copies of the foregoing PETITION FOR WRIT OF CERTIORARI, and, ~~JOINT~~ APPENDIX (except Exhibits which have heretofore been served on respondent, United States Court of Appeals for the Fifth Circuit and the Judges thereof) by mailing the required copies in duly addressed envelopes

by U. S. Mail, postage prepaid to Mr. Walter B. Morgan, Esq., Counsel for Respondent, Post Office Box 2180, Houston, Texas.
Dated August 12th, 1961.

WILLIAM E. KINNEAR
Suite 419-21 American National Bank Building, Beaumont, Texas
*Counsel for Petitioner*

## APPENDIX A-1

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth, Clerk

Post Office Box 23
New Orleans 6, La.

December 27, 1960

Mr. William E. Kinnear
Attorney at Law
Suite 419-21 American National Bank Bldg.
Beaumont, Texas

Mr. Walter R. Morgan
Attorney at Law
P. O. Box 2180
Houston 1, Texas

Re: No. 16780 Kinnear-Weed Corporation,
vs. Humble Oil and Refining Company

Gentlemen:

Find enclosed copy of Order this day entered by the Court in the referenced cause on Appellant's Motion to re-open the case, which is self-explanatory.

Very truly yours,

ED W. WADSWORTH
Edward W. Wadsworth
Clerk

Enc.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 16780

KINNEAR-WEED CORPORATION,
Appellant.

versus

HUMBLE OIL AND REFINING COMPANY,
Appellee.

December 27, 1960

Before RIVES, JONES and WISDOM, Circuit Judges

PER CURIAM

Leave is granted to file the motion to open this case and for other relief which the appellant presented to the Clerk of this Court on December 5, 1960. Tentatively, the Court is of the opinion that the procedure for obtaining any relief from the judgment should be by motion in the district court under Rule 60 (b), Federal Rules of Civil Procedure. Since, however, the judgment of the district court has been affirmed by this Court and the action which the district court is asked to take would be inconsistent with the mandate of affirmance, the district court lacks power to proceed with a motion under Rule 60 (b), unless and until leave is granted to do by this Court. See authorities collected in 7 Moore's Federal Practice, 2d ed., Section 60.30 (2), pp. 339, 340; Section 60.42, pp. 907, 908; cf. Hazel Atlas Company v. Hartford Company, 1944, 322 U.S. 238, 248. If the Court adheres to the views expressed, it will treat the present motion as a re-

quest for leave to proceed in the district court under Rule 60 (b). The views expressed are tenative and are stated at this time merely to simplify the procedure and expedite the disposition of the motion.

The appellee may, if it so desires, file its response to the appellant's motion within thirty (30) days from the date of this order. The motion will then be taken under consideration by the Court on briefs. The appellant may file its brief, typewritten if it so desires, with at least four legible copies within thirty (30) days after the receipt of a copy of appellee's response. The appellee may file any answering brief, likewise typewritten if it so desires, and with four legible copies, within twenty (20) days after receipt of a copy of the appellant's brief.

APPENDIX A-2*

U. S. COURT OF APPEALS
FILED
MARCH 15, 1961
EDWARD W. WADSWORTH
CLERK

**IN THE UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

NO. 16780

KINNEAR-WEED CORPORATION,
Appellant,

v.

HUMBLE OIL AND REFINING COMPANY,
Appellee

(March 15, 1961)

Before RIVES, JONES and WISDOM, Circuit Judges.
PER CURIAM:

The appellant's motion to open case etc. or for leave to file in the District Court a motion under Rule 60(b) Federal Rules of Civil Procedure, which motion was presented to the Clerk of this Court on December 5, 1960 is

DENIED.

## APPENDIX A-3

U. S. COURT OF APPEALS
FILED
MARCH 15, 1961
EDWARD W. WADSWORTH
CLERK

**IN THE UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

NO. 16780

KINNEAR-WEED CORPORATION,
Appellant,

v.

HUMBLE OIL AND REFINING COMPANY,
Appellee

(March 15, 1961)

Before RIVES, JONES and WISDOM, Circuit Judges.
PER CURIAM:

Leave is denied to the Appellant to file the motion on newly discovered fraud, etc. tendered on March 4, 1961.

DENIED.

APPENDIX B-1

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16780

KINNEAR-WEED CORPORATION,
Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
Appellee.

**Appeal from the United States District Court for the Eastern District of Texas**

(September 22, 1958)

Before RIVES, JONES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: "Jet drilling" of oil and gas wells, broadly speaking, is the subject of this controversy presented by the appellant against the appellee in multiple claims listed as follows:

"1. Infringement of Patent No. 2,380,112 and reissue patent thereof Reissue Patent No. 23,416;

"2. Violation of Confidential Relationship;



"3. Unjust Enrichment;

"4. Unfair Competition and Unfair Trade Practices;

"5. Violation of Monopoly or Anti-trust laws of The State of Texas and The United States."

The complaint prays for the recovery of damages in the amount of some two hundred fifty million dollars, plus an accounting for damages suffered since the filing of the complaint which appellant, in the brief states are "staggering in comparison to the paltry sum asked for up to 1953." The trial in the district court consumed some five weeks, followed by lengthy oral arguments, written briefs, and some eighteen months of consideration. The district court then entered full and lengthy findings of fact and conclusions of law,[1] along with judgment for the defendant. The record on appeal consists of more than 4200 pages and 275 exhibits and the briefs and arguments comprise some 800 pages. In addition, the plaintiff-appellant has pending in the District Court for the Southern District of Texas other actions for infringement of the patent in suit against Hughes Tool Company, Reed Roller Bit Company, and Hunt Tool Company. In short, this litigation is of a magnitude befitting the State of Texas. Except, however, for such tremendous volume, the legal principles appear not too difficult.

"Jet drilling" has come into vogue since 1948. Under a number of drilling conditions, it has proved many times faster and more efficient than ordinary rotary drilling. The terms rotary drilling and jet drilling were well described by the district court as follows:

"In rotary drilling, a bit is attached to the lower end of a string of pipe known as the 'drill

---

[1] Reported as Kinnear-Weed Corp. v. Humble Oil & Refining Co., 1956, 150 F.Supp. 143-163

stem' which is rotated by machinery located at the surface. The cutting elements on the bit cut or crush the formation into small chips. Mud laden water known as drilling fluid is pumped down through the drill stem and out through water courses in the bit onto the cutters, the formation being drilled, or both. The drilling fluid cools and lubricates the bit and also removes the chips produced by the bit, carrying them upwardly through the annular space between the drill stem and the wall of the hole, to the surface.

* * * * *

"The term 'jet drilling' as used in the industry means a technique which consists of utilizing the available horsepower on a given drilling rig in the most efficient manner by correlating properly all of the various factors affecting the rate of penetration including (1) rate of fluid circulating through the bit, (2) fluid velocity through the bit nozzles, (3) speed of rotation of the bit, (4) amount of weight maintained on the bit, and (5) annular rising velocity."

*Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 1956, 150 F. Supp. 143, 147, 148, 150.

In accordance with a familiar law of physics,[2] the district court found that "it was discovered that the rate of pentration was greatest when the *product* of nozzle fluid velocity and rate of circulation (frequently referred to as 'QV') was at a maximum, rather than when either of these factors alone was at a maximum." 150 F. Supp. at p. 151.

[2] Under "momentum" Webster's Dictionary tells us, "Linear momentum is momentum of translation and equals the product of the mass and the velocity of the center of the mass".

Appellant's patent in suit, according to its opening paragraph, "relates to new and useful improvements in a rotary drilling bit." Appellant now claims that its patent covered the original "jet bit" which made possible the development of "jet drilling." A true "jet bit" is thus described by the district court:

> "The term 'jet bit' as used in the industry means a bit having the following characteristics:
>
> "(1) water courses properly sized to give the maximum product of nozzle fluid velocity and rate of circulation for a given hydraulic system,
>
> "(2) water courses lined with erosion resistant material so that they will retain their most efficient diameter throughout the useful life of the bit, and
>
> "(3) water courses so positioned that the high velocity fluid issuing therefrom will not destroy or damage the cutting elements of the bit through erosion, which means, as a practical matter, that the streams of drilling fluid issuing from the water courses should not strike the cutting elements of the bit."

150 F. Supp. at p. 150.

Appellant argues and insists on some forty-two "Points on Appeal," in the course of which it attacks all or nearly all of the ninety separate findings of fact by the district court and its twelve conclusions of law. Actually, at the conclusion of the trial, each party had, at the request of the court, submitted proposed findings of fact and conclusions of law, and the direct court finally adopted those submitted by the defendant. That practice is not unusual and is entirely proper. Further, Rule 52 (a), Federal Rules of Civil Procedure, has application to the effect of such findings as those of the court.

Nevertheless, we must say that findings and conclusions which represent the independent judicial labors and study of the district judge are more helpful to this Court. We do not find it necessary to review each of the numerous findings and conclusions, but pass directly to a few simple propositions which we find determinative of the result of this appeal.

The original application for appellant's patent was filed by C. W. Kinnear on January 2, 1942. A number of his claims were rejected by the Patent Office. The patent issued on July 10, 1945, covered only two claims, each restricted to a particular form of roller cutter for drill bits. On January 7, 1946, Kinnear applied for a reissue of his patent on the ground that, as the result of inadvertence, accident, or mistake, the original patent did not fully set forth and claim his true invention. The Patent Office then discovered that the two claims of the original patent had been anticipated by a patent to Decker, No. 1,152,151, which had previously been overlooked, and those claims were rejected. The reasserted claims to the entire bit per se were also rejected upon two grounds: (1) lack of invention; and (2) estoppel because of the abandonment of such claims during the prosecution of the orginal patent. The Board of Patent Appeals ruled contrary to the primary examiner on the question of invention, but affirmed his ruling on estoppel. In an action under Revised Statutes 4915 and 4916, now embodied in 35 U.S.C.A. 145; 146, 251, and 252, the United States District Court for the District of Columbia held that the applicant was not estopped to reassert his claims 5 through 14 in the application. *Kinnear v. Marzall, Commissioner*, D.C. Dist. Col. 1951, 95 F. Supp. 55.

The Patent Office then allowed those ten claims, renumbered as Claims 3 through 12, inclusive, along with eight other claims, 13 through 20, inclusive, which the applicant represented as "based on" the subject matter of the other ten claims. Reissue patent No. 23,416 was thus granted on October 16, 1951, nearly ten years after January 2, 1942, the date of the application for the original patent.

During that ten-year interval, the technique of jet drilling had been fully developed by the appellee, and explained in the publication of a series of technical papers and in two nontechnical articles. Appellant contends, however, that appellee's successful development and use of "jet drilling" came about as the result of breach of confidence and unfair competition.

Shortly prior to issue of his original patent, Kinnear had called on the leading bit manufacturers, Hughes Tool Company, Reed Roller Bit Company, and Hunt Tool Company, in unsuccessful efforts to interest them in the manufacture of his bit. He then called on Douglas Ragland, appellee's chief petroleum engineer, and showed him his patent application, notice of allowance, machine shop drawings, and explained the operation of his bit using a wooden model which has been introduced in evidence. We agree with the findings of fact by the district court that Kinnear did not furnish any confidential information to Ragland, or any information which he had not theretofore furnished to the bit manufacturers, or which could not be readily ascertained from the patent application and from the bits themselves.

The appellee company was not engaged in the manufacture of bits, but Ragland, on its behalf, did consent to

test appellant's bit in its well drilling operations. Accordingly, appellee purchased in 1945 and 1946 about fifty-two of appellant's bits, and actually used about twenty-two of them in tests.

Appellant's contention that Kinnear invented "jet drilling" extends to the invention of a process, method, or technique, going far beyond the scope of his claims which are limited to "improvements in a rotary drill." We are, however, brought to the inquiry of whether Kinnear invented the original "jet bit" which made possible the development of "jet drilling." In that inquiry, we look primarily to the disclosures in the original application for patent filed on January 2, 1942, and the history of the prosecution of that application. From such sources and from all of the evidence, we are convinced that Kinnear, like many others in the industry,[3] had recognized the importance of having the drilling fluid strike directly on the bottom of the hole, but that he did not disclose the necessity of having the water courses lined with erosion-resistant material, nor of having *all* of the water courses so positioned that the abrasive drilling mud under high pressure would not destroy or damage the cutting elements of the bit. In fact, the drawings made a part of the application disclose two ducts leading directly to the tops of the two roller cutters, and the specifications provide:

> "The smaller fluid course ducts directly blast the cutting teeth on the outer bottom roller cutters, as the said teeth on the cutters rotate past the port holes of said smaller fluid course ducts during drilling operation."

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[3] See the patents and publications listed in the district court's finding 76, 150 F.Supp. 157.

Appellant emphasizes that none of the claims of the patent include these two smaller ducts. That is true, but neither do any of the claims exclude them. They are completely inconsistent with the successful operation of a "jet bit." It is elementary that claims are construed in the light of the description and to cover the real invention found in the specification and drawings.[4] So construed, these two smaller ducts are a part of the combination in which appellant's drill was expected to be used. We agree with the district court that the appellant has not infringed appellee's patent. Further, we agree with the disposition by the district court of the claims other than for patent infringement.

The district court went further, and, in line with the admonition of the Supreme Court,[5] passed on the validity of the patent, and held it invalid. That finding is not essential to the disposition of the issues in this case. The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the form of combination bit shown in the patent. For purposes of this case, it is enough to hold, as we do, that the claim must be so limited to a combination bit construed substantially in accordance with the drawings and the descriptive language in the patent specification. The judgment of the district court is therefore

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4 See the many cases collected in 2 Walker on Patents, Sec. 261, pages 1242-1248, and in 69 C.J.S., **Patents**, Sec. 205.

5 Sinclair & Carroll Co., Inc. v. Interchemical Corp., 1945, 325 U.S. 327, 330

## APPENDIX B-2

AFFIRMED.

IN THE
**UNITED STATES COURT OF APPEALS**
FOR THE FIFTH CIRCUIT

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No. 16780

---

KINNEAR-WEED CORPORATION,
Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
Appellee.

---

**Appeal from the United States District Court for the Eastern District of Texas**

---

(April 30, 1959)

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**ON PETITION FOR REHEARING**

Before RIVES, JONES and WISDOM, Circuit Judges.

PER CURIAM: We did not intend to read into the claims of appellant's patent; as limitations of that patent, any part of the drawings or of the specifications not expressed or necessarily referred to by implication in those claims. In our opinion, the claims themselves of the reissue patent are limited to a combination rotary

drilling tool, bit, or drill, and the patent has not been infringed by the appellee. We correct clerical errors in a sentence in the next to the concluding paragraph of the opinion reading, "We agree with the district court that the appellant has not infringed appellee's patent" by changing the sentence to read "We agree with the district court that the appellee has not infringed appellant's patent." The petition for rehearing is

DENIED.

## APPENDIX B-3

In The
**UNITED STATES COURT OF APPEALS**
For The Fifth Circuit

NO. 16780

KINNEAR-WEED CORPORATION, *Appellant*
versus
HUMBLE OIL & REFINING COMPANY, *Appellee*

**Appeal from the United States District Court for the Eastern District of Texas**

(JULY 2, 1959)

ON SECOND PETITION FOR REHEARING

Before RIVES, JONES and WISDOM, Circuit Judges.

Per Curiam:

The second petition for rehearing presented in this cause on the 21st day of May, 1959, is received and permitted to be filed, but, upon consideration, the said second petition for rehearing is

DENIED.

(ORIGINAL FILED: July 2, 1959)

## APPENDIX B-4

## KINNEAR-WEED CORPORATION, Plaintiff, v. HUMBLE OIL & REFINING COMPANY, Defendant.

**Civ. A. 2363.**

United States District Court
E. D. Texas, Beaumont Division.

Sept. 28, 1956.

150 F. Supp. 143

CECIL, District Judge.

1. Plaintiff, Kinnear-Weed Corporation, is a Texas corporation having its principal office and place of business in Beaumont, Texas. Plaintiff is the owner of U.S. Patents Nos. 2,380,112 Re. 23,416, both issued to C. W. Kinnear, the subject matter of which is a rotary drill bit for drilling oil and gas wells. These patents constitute plaintiff's principal assets and plaintiff's only business is the exploitation of these patents.

2. Defendant, Humble Oil & Refining Company, is a Texas corporation having its principal office and place of business in Houston, Texas. Defendant is engaged in the business of producing, refining and marketing petroleum and petroleum products. Defendant is not in the drill bit business, but does use drill bits in the drilling of its oil and gas wells. Defendant has an office, and does business in the Eastern District of Texas.

3. Plaintiff charges defendant with breach of a confidential relationship, unfair competition, patent infringement and violation of the Federal and Texas anti-trust

laws. All of these claims involved, and are inextricably connected with, the above-mentioned two Kinnear patents, Nos. 2,380,112 and Re. 23,416.

4. In addition to this suit, plaintiff has sued Hughes Tool Company, Reed Roller Bit Company and Hunt Tool Company, all of Houston, Texas, for infringement of the same two patents, as well as for violation of confidential relationship and unfair competition. These suits are pending in the United States District Court for the Southern District of Texas, Houston Division.

5. In rotary drilling, a bit is attached to the lower end of a string of pipe known as the "drill stem" which is rotated by machinery located at the surface. The cutting elements on the bit cut or crush the formation into small chips. Mud laden water known as drilling fluid is pumped down through the drill stem and out through water courses in the bit onto the cutters, the formation being drilled, or both. The drilling fluid cools and lubricates the bit and also removes the chips produced by the bit, carrying them upwardly through the annular space between the drill stem and the wall of the hole, to the surface.

6. Rotary drill bits fall into the following generally recognized categories, depending upon the cutting elements on the bit:

(a) Drag bits
(b) Cone bits
(c) Cross-roller bits
(d) Combination bits

7. Drag bits have one or more blades with sharp, chisel-like cutting edges as their only cutting elements. They are normally used for drilling in relatively soft formations,

such as sand and shale, and accomplish drilling by means of the dragging or scraping action of the cutting edges on the formation. Drag bits having two blades are commonly known as "fish-tail" bits by reason of their shape. Drag bits have been used in the Gulf Coast since approximately 1900.

8. Cone bits normally have either two or three cone-shaped cutters, which are usually equipped with a plurality of sharp teeth. The cones are mounted on axles or spindles, and as the bit rotates, the cones roll over the bottom and accomplish drilling by means of the crushing or chipping action of the teeth on the formation. These bits have no blades of any kind and the cones cut the entire bottom of the hole. Cone bits have been used in the Gulf Coast since approximately 1910. Originally intended for drilling hard formations only, such as rock, bits of this type have gradually been modified and improved with the result that cone bits are now capable of drilling through practically all formations, hard and soft, and have to a great extent replaced drag bits, which now account for a very small percentage of the total bits used. The cone bit was pioneered and developed primarily by Howard R. Hughes, Sr. and the Hughes Tool Company, which is the largest manufacturer of drilling bits in the world.

9. Cross-roller bits have two independent sets of rolling cutter elements equipped with cutting teeth. The first set consists of a pair of outer-roller cutters, which cut the outer bottom portion of the hole; the other set consists of two or more roller cutters mounted on an axle or axles disposed between the outer roller cutters at substantially right angles to the axles of the outer-roller cutters. Cross-roller bits have no blades and the entire bottom

of the hole is cut by the rolling cutters. Like cone bits, cross-roller bits were originally intended for drilling hard formations, such as rock, and accomplish drilling by the crushing or chipping action of the teeth on the formation being drilled. They have been used in the Gulf Coast area almost as long as cone bits.

10. Combination bits have both roller cutters and one or more blade-type cutters. Generally, the roller cutters are mounted on the inner sides of a pair of downwardly extending legs, and the blade is positioned between the roller cutters. Combination bits are intended to be used in alternating hard and soft formations. In actual practice, however, their use is largely confined to drilling the surface hole, i.e., the first thousand or so feet of the well. Relatively few combination bits are used in comparison with the other types, particularly cone and cross-roller bits.

11. Plaintiff contends that C. W. Kinnear conceived the idea of positioning the water courses in the bit body so that the streams of drilling fluid discharged therefrom would miss the cutting elements and strike directly on the bottom of the hole in what plaintiff refers to as "a concentrated stream" or a "direct blast". Plaintiff further contends that this concept as disclosed and claimed in the two patents in suit, was disclosed by C. W. Kinnear to defendant in confidence prior to the issuance of either of the patents in suit, was utilized by defendant to its own advantage in the drilling of its wells, was disclosed by defendant to others in violation of such confidence, was wrongfully appropriated and publicized by defendant as defendant's own development and was monopolized or attempted to be monopolized and was used by defendant to restrain trade, in violation of the anti-trust laws.

12. Defendant denies that C. W. Kinnear invented the concept of positioning the water courses in a bit so that the drilling fluid would miss the cutters and strike directly on the bottom of the hole, denies that the patents in suit disclose or claim any such concept, denies that C. W. Kinnear disclosed such concept (or any other information) to defendant in confidence, denies that defendant utilized, disclosed to others or published any information obtained by it from C. W. Kinnear, denies that it has competed unfairly with C. W. Kinnear, or his successors in interest, including plaintiff, denies that the patents in suit are valid or have been infringed by defendant, denies that defendant has violated any of the anti-trust laws and denies that Kinnear, or his successors in interest, including plaintiff have been injured by any act of defendant.

13. On January 2, 1942, C. W. Kinnear filed an application in the U. S. Patent Office entitled "Drill", disclosing a combination bit having a pair of disk-shaped outer-roller cutters mounted on the opposite side faces of a fish-tail blade, with two pairs of water courses through the bit body, one pair positioned to discharge drilling fluid directly onto the tops of the outer-roller cutters and the other pair positioned to discharge drilling fluid onto and wash down the opposite side faces of the fish-tail blade and thence onto the bottom of the hole. The applicant asserted claims to the entire combination bit and to the structure of the outer-roller cutter per se. The Patent Office rejected the claims to the entire combination bit, but allowed two claims covering the roller cutter per se, and U. S. Patent No. 2,380,112 was issued to C. W. Kinnear on July 10, 1945 containing these two claims.

14. On June 7, 1946, Kinnear applied for a reissue of

a patent on the ground that, as the result of inadvertence, accident or mistake, the original patent did not fully set forth and claim his true invention. During the prosecution of the reissue application, the two claims of the original patent covering the roller cutter per se were rejected by the Patent Office and were abandoned by the applicant, but eventually the patent was reissued on October 16, 1951, as Re. 23,416, with 18 claims (Nos. 3-20). The two claims of original Patent No. 2,380,112 form no part of Re. 23,416.

15. In the Spring of 1945, after receiving notice from the Patent Office that the two claims covering the roller cutter per se had been allowed on his original application, Kinnear called on Douglas Ragland, an employee of defendant. Kinnear explained his bit to Ragland and told Ragland the status of his patent application. This was the first contact between Kinnear and defendant concerning or relating to the subject matter of this suit. The purpose of Kinnear's visit was to induce defendant either to finance the manufacture of Kinnear's bit or to purchase and test some of his bits. Ragland explained to Kinnear that, as a matter of policy, defendant was not interested in financing manufacture of the bit, but that defendant would be willing to test the bit. Thereafter in 1945 and 1946, defendant purchased approximately 52 bits from Kinnear. These bits were made in accordance with Patent No. 2,380,112, substantially as shown by the wooden model, Plaintiff's Exhibit No. 9. Defendant used approximately 22 of these bits in tests and junked the remaining 30, after concluding that the Kinnear bit was less satisfactory than competitive bits.

16. At no time did defendant request Kinnear to fur-

nish any information to defendant. All information given by Kinnear to defendant was volunteered by Kinnear in his efforts to interest defendant in financing the manufacture of, or in purchasing, his bits. Kinnear did not ask defendant to keep any information confidential and defendant did not promise or agree to keep confidential any information received by it from Kinnear.

17. The information disclosed by Kinnear to defendant consisted of the contents of Kinnear's original patent application (including the notice of allowance of the two claims on the roller cutter per se), some machine shop drawings showing the actual dimensions of his bit and his wooden model. Plaintiff's Exhibit No. 9. At no time did Kinnear furnish to defendant any information concerning his invention which was not contained in the patent application or shown by the drawings and/or the wooden model.

18. The drawings and the wooden model which Kinnear showed defendant simply illustrated the bit disclosed in his application. Accordingly, Patent No. 2,380,112 discloses everything of substance which Kinnear told any employee of defendant with reference to his invention.

19. Prior to his first contact with defendant in the Spring of 1945, Kinnear had discussed his bit with the leading bit manufacturers in the Houston area, including Hughes Tool Company, Reed Roller Bit Company and Hunt Tool Company, and had disclosed to each of these substantially the same information he later disclosed to defendant, including his patent application, drawings of his bit and his model.

20. All of defendant's acts of which plaintiff complains, including the alleged publication and disclosure to others

of information received from Kinnear, and use of "jet" bits and "jet" drilling, occurred after the issuance of Patent No. 2,380,112.

21. Kinnear sold a few of his bits to other oil operators in addition to the bits he sold to defendant in 1945 and 1946. Each of these bits disclosed to the public the way in which it was constructed. Any competent mechanic could have duplicated the Kinnear bit after examining one of the bits which Kinnear sold and any competent driller on seeing such a bit would have known how to use it for drilling wells.

22. The term "jet drilling" as used in the industry means a technique which consists of utilizing the available horsepower on a given drilling rig in the most efficient manner by correlating properly all of the various factors affecting the rate of penetration, including (1) rate of fluid circulating through the bit, (2) fluid velocity through the bit nozzle, (3) speed of rotation of the bit, (4) amount of weight maintained on the bit, and (5) annular rising velocity.

23. The term "jet bit" as used in the industry means a bit having the following characteristics:

(1) water courses properly sized to give the maximum product of nozzle fluid velocity and rate of circulation for a given hydraulic system,

(2) water courses lined with erosion resistant material so that they will retain their most efficient diameter throughout the useful life of the bit, and

(3) water courses so positioned that the high velocity fluid issuing therefrom will not destroy or damage the cutting elements of the bit through erosion, which means,

as a practical matter, that the streams of drilling fluid issuing from the water courses should not strike the cutting elements of the bit.

24. Kinnear did not furnish defendant any information concerning "jet drilling" or "jet bits".

25. Neither of the patents in suit contains a disclosure of "jet drilling" or "jet bits".

26. The technique of "jet drilling" was developed by defendant as the result of a research program into the hydraulic factors affecting the rate of penetration in rotary drilling, which was commenced in 1943, was formalized as Research Project 4025 on January 1, 1946 and was intensified as equipment and personnel became available in the years immediately following the War. This program involved primarily a series of "short interval" tests conducted on a number of defendant's drilling rigs under actual field conditions, wherein all but one of the various factors known to affect the rate of penetration would be held constant while the remaining factor would be varied from minimum to maximum within practical limits and the results recorded. The data obtained from these tests enabled defendant's engineers to determine the relative importance of the several factors involved, and to correlate these factors in order to achieve optimum efficiency in drilling. For example, it was discovered that the rate of penetration was greatest when the *product* of nozzle fluid velocity and rate of circulation (frequently referred to as "QV") was at a maximum, rather than when either of these factors alone was at a maximum. These data also enabled defendant's engineers to predetermine the most efficient set of drilling conditions for any given drilling

operation, including, in particular, selecting the diameter of the nozzle in the bit which would produce the maximum QV.

27. Defendant's engineers also discovered, as a result of this research project, that when the bit was equipped with nozzles of the proper diameter to produce a jet stream having the maximum QV, the velocity of the jet stream was so great that (a) the nozzles had to be lined with an extremely hard, erosion resistant material or they would become enlarged very quickly and would no longer be the proper size, and (b) the cutting elements of the bit had to be protected from the abrasive effects of the high velocity jet streams, either by hard surfacing or, preferably, by directing the streams so as to miss the cutting elements and hit the bottom of the hole. Both the lining of nozzles with erosion resistant material and the positioning of the nozzles so as to discharge drilling fluid directly onto the bottom of the hole, missing the cutters, were old long before the inception of defendant's research program. For example, in 1938 the defendant used a large number of so-called "parabolic blade" bits having water courses so positioned as to discharge streams of drilling fluid directly on the bottom of the hole ahead of the blade. Hard metal nozzles were used to protect water courses from fluid erosion at least this early.

28. Defendant's initial experiments were with drag bits and defendant obtained from various bit manufacturers drag bits equipped with tungsten carbide nozzles of varying diameters for use under different drilling conditions, the nozzles being positioned so as to direct the high velocity jet streams onto the bottom of the hole, ahead of

the blade, rather than onto the blade. These bits obtained and used by defendant commencing in 1946, were the first of the so-called "jet" bits.

29. Defendant's drilling crews, using "jet" drag bits and applying the technique of "jet" drilling, achieved significant increases in rate of penetration and over-all drilling efficiency in a number of instances.

30. Commencing in 1948, defendant's engineers published a series of technical papers containing the results of defendant's research program and explaining the principles of "jet" drilling with "jet" drag bits.

31. In 1948 defendant requested several of the leading bit manufacturers, particularly Hughes Tool Company and Reed Roller Bit Company, to furnish defendant with rock bits suitable for use in "jet" drilling. The conventional rock bit in general use at that time had relatively larger water courses than those used in "jet" drag bits with which defendant had previously experimented. Moreover, the water courses in conventional rock bits in most instances were not lined with abrasion resistant material and they discharged in whole or in part upon the cutting elements. In order to convert their conventional rock bits to "jet" bits, the bit manufacturers relocated the nozzles so that the jet streams would not strike the cutters, equipped the nozzles with erosion resistant material and, generally, reduced the total nozzle area. None of these changes presented any difficult or unusual problems to the bit manufacturers since bits had been made for many years which incorporated water courses positioned to discharge drilling fluid onto the bottom of the hole missing the cutters and nozzles made of erosion resistant material.

Moreover, bits had been made for many years with water courses as small as those found desirable for "jet" drilling. The first "jet" rock bits were furnished to defendant by the bit manufacturers during the latter part of 1948 and early 1949. Defendant's tests indicated that these "jet" rock bits, when used in accordance with the "jet" drilling technique, would drill faster than conventional rock bits under many drilling conditions.

32. As the result of defendant's successful use of the experimental "jet" rock bits, the bit manufacturers went into large scale commercial production of "jet" rock bits. Hughes Tool Company's first production line jet rock bit was the so-called "Iron Pants", which came on the market early in 1950. Reed Roller Bit Company followed suit with its "Liquid Blast" cross-roller jet bit about the same time. These were followed by Hughes "Integral Jet" rock bit and by Reed's "Twin Blast" rock bit in 1952.

33. Approximately 30 per cent of the rock bits now being manufactured are of the "jet" type. The large percentage of conventional rock bits still being manufactured is due to a number of factors including the additional cost of "jet" bits, the increased over-all cost of "jet" drilling and the failure of "jet" bits to outperform conventional bits under many drilling conditions.

34. In addition to the technical papers published by defendant's engineers, defendant published two articles in its house organ, "The Humble Way", one in 1950 and another in 1952, summarizing in non-technical language the results of defendant's work with "jet" bits and "jet" drilling. This magazine is distributed by defendant throughout all 48 states to its stockholders and to others interested in the oil business.

35. Defendant summarized the results of its research work, including its development of "jet" drilling, in periodic reports submitted to its affilate, Standard Oil Development Company, pursuant to a contract between these two corporations providing for the sharing of the benefits and the expenses of research conducted by each. This information was in turn transmitted by Standard Oil Development Company to other members of the Standard group with which it had similar arrangements.

36. No information disclosed by Kinnear to defendant was used by defendant in developing or practicing "jet" drilling in using "jet" bits, in obtaining "jet" bits, from bit manufacturers, nor was any such information included in defendant's reports to its affiliates, in the technical articles on "jet" drilling, or in the two Humble Way articles on "jet" drilling.

37. None of the information furnished by Kinnear to defendant in connection with Kinnear's alleged invention and/or the bit which he sold to defendant and which defendant tested and then discarded, was used by defendant for any purpose other than the testing and evaluation of the Kinnear bit. Defendant made no unauthorized disclosures of this information to others and made no agreements with bit manufacturers which pertained to Kinnear's alleged invention and/or bit or to anything which Kinnear disclosed to defendant.

38. Defendant has not manufactured any bits, and has not "palmed off" as its own or as those of bit manufacturers any bits incorporating any invention or idea of Kinnear or of plaintiff.

39. Defendant has committed no fraudulent or unfair trade practice in connection with jet drilling or jet bits.

or in connection with any invention of Kinnear; or in connection with anything disclosed by Kinnear to defendant.

40. Plaintiff has never made or sold a bit. The business which Plaintiff claims was interrupted or damaged by defendant was new and unestablished. Kinnear never manufactured or sold bits on a commercial basis, and he lost money on the bits he did manufacture and sell.

41. Plaintiff has suffered no injury or damage as a result of any act of defendant alleged in Paragraphs 10, 11 and 12 of the Complaint.

42. The publication by defendant of articles on "jet" drilling, complained of by plaintiff, occurred more than two years before the filing of this suit and such publication was known to plaintiff or its predecessors at or shortly after the time it occurred.

43. Defendant did not enter into any of the unlawful agreements, combinations or conspiracies alleged in Paragraph 12 of the Complaint.

44. Defendant did not monopolize or attempt to monopolize trade or commerce, as alleged in Paragraph 12 of the Complaint.

45. Defendant did not interfere with the consummation of a business deal between plaintiff or its predecessors and Houston Oil Field Material Company, as alleged in Paragraph 12 of the Complaint.

46. Defendant did not interfere with the sale of bits by plaintiff and/or plaintiff's predecessors, as alleged in Paragraph 12 of the Complaint.

47. Defendant has committed no act prohibited by the Federal or Texas anti-trust laws nor has defendant in-

jured the public by any of the acts alleged in Paragraph 12 of the Complaint.

48. In its claim of patent infringement, plaintiff charges that defendant has infringed both Patent No. 2,380,112 and Re. No. 23,416 by using drill bits having water courses so positioned that the streams of drilling fluid issuing therefrom strike directly upon the bottom of the hole without first striking the cutting elements of the bit. Plaintiff has specified 19 different bits, each of which it contends infringes its patents. These bits are made by 8 different bit manufacturers. All of the accused bits are "jet" bits. Some of them are drag bits, some are cone bits, some are cross-roller bits, and some are combination bits.

49. Defendant contends that it has not infringed either of plaintiff's patents by its use of any of the accused bits or by any other act. Defendant further contends that Patent No. 2,380,112 was extinguished by the grant of Reissue No. 23,416, and that Reissue No. 23,416 is invalid because of anticipation and lack of invention over the prior art.

50. The specification and drawings of Re. 23,416 are the same as the specification and drawings of Patent No. 2,380,112, except that the reissue contains one additional "object" of the alleged invention in column 2, lines 28 through 39. The claims of Re. 23,416, of course, are different from those of Patent No. 2,380,112. Plaintiff contends that claims 3 through 19 of the reissue are infringed by defendant's use of the accused combination bits, that claims 13 through 16 are infringed by defendant's use of the accused cone and cross-roller bits, and that some of all of the claims are infringed, through application of the "doctrine of equivalents", by defendant's use of the

accused drag bits. Plaintiff concedes that none of the claims covers the method of "jet" drilling or any other method.

51. The disclosure of both patents is confined to a specific type of combination bit; which has a pair of disk-shaped outer-roller cutters mounted on spindles extending outwardly from the opposite side faces of a fish-tail blade. Several embodiments of this bit are shown. The principal embodiment has a plain fish-tail blade. In the other embodiment the fish-tail has slots in its cutting edge in which small, individual roller cutters are mounted. Two of the four water courses through the bit body are positioned to discharge drilling fluid on top of the two outer-roller cutters. The other two water courses are positioned to discharge drilling fluid onto and wash down the front faces of the cutting blades and thence onto the bottom of the hole. The apparent purpose of the applicant was to provide a bit capable of drilling through alternating hard and soft formations, which is the intended purpose of all combination bits.

52. Neither of the patents contains any disclosure of any bit other than a particular type of combination bit. There is no mention in either of the patents of drag bits, cone bits or cross-roller bits. There is no indication in either of the patents that the subject matter of the alleged invention was the positioning of the water courses. There is no suggestion in either patent that any of the water courses should be so positioned that the drilling fluid issuing therefrom would be discharged so as to miss the cutters and strike directly onto the bottom of the hole. On the contrary, the drilling fluid discharged from each of the water courses of the bit disclosed in the patents would hit the cutting elements.

53. Neither patent discloses or mentions the use of abrasion resistant material in the water courses or nozzles. Neither patent even suggests the existence of an erosion problem. Long prior to the date of Kinnear's alleged invention, the use of abrasion resistant material in the water courses or nozzles or drill bits was well known, as shown by the publication "Fusion Facts", October, 1938, pp. 194-196 (Defendant's Exhibit 148).

54. Neither of the patents discloses the drilling conditions under which the tool shown therein is to be used. Specifically, there is no disclosure of the pump pressure, circulating rate, nozzle velocity, rotating speed, weight on the bit or annular rising velocity, these being among the factors which were known long prior to the date of Kinner's alleged invention to affect the rate of penetration and which defendant correlated in developing its "jet" drilling technique. The only reference to pressure in the patents is in the expression:

> "It being remembered that flushing fluid under high pressure will dislodge and cut a great amount of the cuttings from the bottom of the well hole."

Prior to Kinnear the industry had used pump pressure as high as 2500 pounds per square inch, which is in excess of the pressures generally used today even in practicing jet drilling.

55. Neither of the patents discloses the siz of any of the water courses other than to refer to the lower pair (discharging down the front faces of the blade) as "large fluid course ducts" and the upper pair (discharging onto the outer-roller cutters) as "smaller fluid course ducts". However, no dimensions are given. Moreover, there

is no disclosure in either of the patents of the existence of an optimum nozzle size to achieve the maximum QV under a given set of drilling conditions, not that the nozzle size should be changed so as to maintain the maximum QV as the other drilling conditions change during the drilling of a well.

56. The word "blast" which is used in the patents in suit to describe the action of the drilling fluid on the bottom of the hole has no particular significance in this art and is not defined in the patents. If the term is to be given any meaning at all, it must mean the same thing as the term "jet", which has been used to describe the action of drilling fluid on the bottom of the hole since the inception of rotary drilling.

57. The Patent Office file histories of both patents clearly show that at least up until the summer of 1951 (by which time "jet" bits had gained considerable popularity and were being widely used in the drilling industry) Kinnear regarded himself as the inventor of nothing more than the particular form of combination bit actually disclosed in his patents. The oath executed by the applicant on June 3, 1946 and filed with his application for reissue states that the invention for which the reissue patent was sought consisted of "the combination of a fish-tail type drill for removing soft formation from the bottom of a bore hole and a roller type drill for removing hard formation". In that oath the applicant further described his invention as a drill bit having "a body * * * whose lower portion is reduced in thickness forming a shank, and terminating at its lower end in a blade, or blades, having forwardly directed cutting edges adapted to operate against the bottom of the bore * * * with spindles anchored to the

opposite sides of the shank whereon roller cutters are mounted and positioned to operate against the outer bottom portions of the bore".

58. With respect to the positioning of the water courses in his bit, Kinnear represented to the Patent Office that he considered the positioning of the lower pair of water courses so that the drilling fluid discharged therefrom would wash down the front faces of his fish-tail blade, as a part of his alleged invention. In this connection, Kinnear distinguished his invention over that shown in the Waxler Patent No. 2,198,849, which had been cited by the Patent Office, by arguing that Waxler's water courses were so positioned that the flushing fluid issuing therefrom would "blast" out some distance in front of the drag blades and that it would be "impossible" for the drilling fluid in Waxler's bit to wash down the front faces of his drag blades. Kinnear used the same argument to distinguish his invention over the Scott patent No. 1,850,358. During the course of the prosecution of the original patent, Kinnear amended many of his claims to recite that the lower water courses were so positioned that fluid issuing therefrom would discharge "directly onto and wash down" the front faces of the blades.

59. Kinnear also represented to the Patent Office, for the purpose of distinguishing his alleged invention from the prior combination bits cited by the Examiner, that none of the latter showed the mounting of the outer-roller cutters on spindles attached to the opposite side faces of the blade as in his construction, but instead showed the outer-roller cutters mounted on a pair of downwardly and outwardly extending legs.

60. Claims 5 through 12 of Re. No. 23,416 appeared in the reissue application as claims 5 through 14. These claims were rejected by the Patent Office on the ground of estoppel and also on the ground that the claims lacked invention over the prior art. From the Examiner's rejection of claims 5 through 14, Kinnear appealed to the Patent Office Board of Appeals. The Board of Appeals disagreed with the Examiner on the question of patentability, stating:

> "We have compared claims 5 to 14, inclusive, with the prior art cited by the Primary Examiner, and we do not find in the latter the specific relation of the elements recited in these claims, which require that the spindles be mounted on the opposite side faces of the reduced portion of the body. For the reason that we do not agree with the position of the Primary Examiner to the effect that reducing the shank of the bit does not affect the operation of the bit in connection with the specific arrangement of fish-tail and rolling cutters, we are not of the opinion that patentability of these claims is denied by this prior art."

However, the Board of Appeals affirmed the rejection of the claims on the ground of estoppel.

61. On April 15, 1949, Kinnear appealed from the decision of the Board of Appeals to the United States District Court for the District of Columbia, under R.S. § 4915, 35 U.S.C.A. §§ 145, 146. This proceeding terminated in a judgment dated February 9, 1951, Kinnear v. Marzall, D.C., 95 F. Supp. 55, holding that the applicant was not estopped to make claims 5 through 14, that the Patent Office had erred in rejecting those claims on the ground of estoppel and ordering the Patent Office to issue Kinnear a patent for those claims. The court con-

fined its decision to the question of estoppel and did not pass on the question of patentability, expressly stating that the patentability question was not before it.

62. In compliance with the judgment of the District Court, prosecution was resumed before the Patent Office. In an amendment dated June 26, 1951, the applicant sought to add claims 21 through 34, some of which read directly upon the Hughes tri-cone jet bits and others on the Reed "Liquid Blast" bits, both of which were then on the market. These same bits are among the accused bits which plaintiff alleges infringe its patents. In this amendment, Kinnear mentioned for the first time the expression "jet" drilling, and these were the first claims asserted by Kinnear reading on any "jet" bits. The Examiner refused to enter this amendment on the ground that the subject matter of claims 21 through 34 was not disclosed in the specification. Kinnear did not appeal from the Examiner's refusal to enter the amendment and thereafter never again asserted those claims or claims of a similar scope.

63. By amendment dated August 1, 1951, Kinnear added claims 35 through 42 to his application, representing to the Patent Office that these claims were "based on" the subject matter of claims 5 through 14, which had previously been held to be allowable by the District Court. Relying upon this representation, the Patent Office allowed claims 35 through 42 without further examination, and these claims now appear as claims 13 through 20 of the reissue patent.

64. Each of the claims of the reissue patent calls for roller cutters, in so many words, as an essential element of the claimed combination. None of the accused drag

bits embodies any sort of roller cutters nor any equivalent structure.

65. Each of the claims of the reissue patent, when properly construed, calls for a drag type blade (either with or without small roller cutters mounted therein) as an essential element of the claimed combination. In this connection, claims 3 through 12 and claims 17 through 20 call for "cutting-blades", "blade", "fish-tail type of drill", "forward cutting edges", "oppositely arranged cutting blades", and a "drag type blade" in describing the inner cutter. These terms obviously could apply only to a drag type blade. Although claims 13 through 16 employ the term "cutting elements" to describe the inner cutter, this term is defined in the specification as consisting of either a plain drag type blade having slots with small roller cutters mounted therein, as shown in Figs. 8, 9 and 10. None of the accused rock bits (either cone or cross-roller type) embodies any sort of blade nor equivalent structure.

66. Each of the claims except 5, 6 and 12 calls for a bit body whose lower portion is reduced in thickness forming opposite side faces and terminating in oppositely arranged cutting blades or cutting elements. Claims 5 and 6 call for a similar structure, described as a "shank" terminating in a forward cutting edge. None of the accused rock or combination bits embodies such a construction, but on the contrary all such bits are provided with downwardly extending legs which increase, rather than decrease the size of the bit body at its lower end.

67. Claim 12 calls for spindles having free ends which diverge upwardly and outwardly from the body of the bit. None of the accused bits has spindles with free ends

diverging upwardly and outwardly, nor any equivalent structure.

68. Claims 4 through 8, 10 and 11 call for reaming side margins on the fish-tail blades. None of the accused combination bits has side reaming margins on its cutting blades, nor any equivalent structure.

69. Claims 3, 9, 10, 12 and 14 through 19 specify that the flushing fluid issuing from the discharge nozzles is forced between the inner face of a roller cutter and the reduced portion of the bit body through channels or open spaces formed by the sides of the roller cutters and the faces of the reduced body portion. None of the accused bits embodies such a construction nor any equivalent structure.

70. Claims 13 through 16 call for "outer" roller cutters mounted *on* the body of the bit which, in view of the drawings and specifications of the patent, means that they are mounted wholly outside the body of the bit. In all of the accused bits having rolling cutters, which includes all of the accused bits other than drag bits, the roller cutters are mounted within the body of the bit, rather than on the outside of the body of the bit.

71. Claim 19 calls for a bit with roller cutters having a particular type of notched tooth structure which is not found in any of the accused bits.

72. Claim 20 calls for a bit with a drag type blade having slots with roller cutters mounted herein for cutting the inner bottom part of the well hole. None of the accused bits is provided with such a structure, nor any equivalent structure.

73. Reissue patent No. 23,416 is not a pioneer patent, it being simply an improvement patent in a very crowded field.

74. The claims of the patent are so-called "combination" claims, the alleged invention residing entirely in the combination of the elements recited therein, rather than in the elements themselves, each of which was old and well known at the time the original application was filed.

75. Kinnear was not the inventor of the combination bit, as such. Combination bits were known to the art at least as early as 1915, when Bardeen obtained Patent No. 1,136,203. The other references cited by the Patent Office during the prosecution of the Kinnear applications show that the idea of the combination bit was old long before Kinnear.

76. The following references, none of which were considered by the Patent Office during prosecution of the patents in suit and each of which preceded Kinnear's original filing date by more than one year, show that it was old and well known to position the water courses in a bit body so that the drilling fluid issuing therefrom would miss the cutters and strike directly on the bottom of the hole:

(a) Drag bits, and patents and publications relating thereto:

Greenhead (Defendant's Exhibit 1)
Hughes (Defendant's Exhibit 18 and 16)
Dunlop (Defendant's Exhibits 97 and 98)
Lauderback Patent No. 1,727,655
Ragsdale Patent No. 1,961,390

Harrington Patent No. 1,962,589

Composite Catalogue of Oil Field and Pipe Line Equipment (1939 Edition), pages 750, 751 and 754.

Oil Weekly, March 26, 1926, pages 32, 34, 72, 74, 76, 77, 78 and 80.

Oil & Gas Journal, February 22, 1940, page 72.

(b) Cone bits, and patents and publications relating thereto:

Hughes Tool Company's 1911 tri-cone (Defendant's Exhibit No. 31)

Hughes Patents No. 1,256,694 and 1,143,273

Murphy Patent No. 1,647,740

Simpson Patent No. 1,730,301

Collins Patents No. 1,945,258 and 1,992,992

Wright Patent No. 2,049,581

Zublin Patent No. 2,184,067

Oil Bulletin, December 1929, page 1350.

(c) Cross-roller bit, patents and publications:

Reed Patent No. 2,047,110

Williams Patent No. 2,058,750

Catland Patents No. 2,063,012; 2,066,671; 2,068,375; 2,087,500; and 2,089,466.

Zublin Patents No. 2,121,112 and 2,201,570

Composite Catalogue of Oil Field and Pipe Line Equipment (1938 Edition), page 267.

Composite Catalogue of Oil Field and Pipe Line Equipment (1940 Edition), page 716.

Hughes Patent No. 1,327,913

(d) Miscellaneous bits, patents and publications:

Hughes disk bits (Defendant's Exhibits 32, 40 and 41)

Grant shale bit (Defendant's Exhibit 132)

Zublin "Simplex" bit (Defendant's Exhibit 113)
Zublin "Differential" bit (Defendant's Exhibit 114).
Hughes Patent No. 1,204,157
Composite Catalogue of Oil Field and Pipe Line Equipment (1940 Edition), pages 2544-2547).

77. Each of the bits referred to in Findings of Fact No. 76 was shown by clear and substantial proof beyond a reasonable doubt to have been made, sold, and used more than one year prior to the filing date of Kinnear Patent No. 2,380,112.

78. The positioning of the water courses in the accused bits so that the drilling fluid issuing therefrom misses the cutters and strikes directly on the bottom of the hole simply follows the teaching of the prior art.

79. If any of the claims of Reissue Patent No. 23,416 were stretched so as to cover any of the accused drag bits, such claim would read on and be anticipated by each of the prior art references identified in Findings of Fact No. 76(a).

80. If any claim of Reissue Patent No. 23,416 were stretched to cover any of the accused cone bits, such claim would read on and be anticipated by each of the prior art references identified in Findings of Fact No. 76(b).

81. If any claim of Reissue Patent No. 23,416 were stretched to cover any of the accused cross-roller bits, such claim would read on and be anticipated by each of the prior art references identified in Findings of Fact No. 76(c).

82. Plaintiff did not establish a date of invention prior to approximately August 20, 1941, this being the date the

draftsman who prepared the original patent drawings first saw Kinnear's drawings of his bit.

83. The following patent, each of which preceded Kinnear's filing date by more than one year, show that it was old and well known to position water courses in the body of a combination bit so that the drilling fluid issuing therefrom would miss the cutters and strike directly upon the bottom of the hole:

Waxler 2,198,849
Kammerer 2,049,543

Moreover, each of the following patents shows that it was old and well known to mount roller cutters on the inner sides of a pair of downwardly extending legs in a combination bit:

(a) Patents which issued more than one year prior to Kinnear's filing date:

Sorensen Patent No. 1,394,769
Scott Patent No. 1,932,487
Kammerer Patent No. 2,049,543
Waxler Patent No. 2,198,849

(b) Patents for which applications were filed prior to the earliest date of invention established by Kinnear:

Kammerer Patents No. 2,244,537 and 2,320,136

84. The positioning of the water courses in the accused combination bits so that the drilling fluid issuing therefrom misses the cutters and strikes directly on the bottom of the hole, and the provision of roller cutters mounted on the inner sides of a pair of downwardly extending legs, simply follow the teaching of the prior art.

85. If any claim of Reissue Patent No. 23,416 were

stretched so as to cover any of the accused combination bits, such claim would read on and be anticipated by each of the prior art references identified in Findings of Fact No. 83.

86. Because of the broad scope which Plaintiff asserts for the claims of Reissue Patent No. 23,416, the entire bit manufacturing industry and the entire oil industry are affected by and concerned with the validity of the claims of this patent.

87. Hughes Patent No. 1,204,157, granted in 1915, discloses a drilling bit having a body with a reduced lower portion, spindles mounted on the opposite side faces of the reduced lower portion and roller cutters mounted on these spindles. The reduced lower portion of the bit terminates in two parallel cutting edges which cut the inner bottom portion of the hole. The bit is provided with two pairs of water courses, one pair directing streams of drilling fluid onto the tops of the outer roller cutters, while the other pair directs the streams of drilling fluid onto the bottom of the hole between the cutting edges. In these respects, therefore, the bit disclosed by Hughes is essentially the same as the bit disclosed in the patent in suit even as interpreted by Kinnear. The cutting edges shown in the Hughes bit were intended to destroy the core left in the center of the hole by the outer roller cutters. This function was the same as the intended function of Kinnear's fish-tail blade. In addition, Hughes' cutting edges were intended to cut by a dragging or scraping action, which is the same action as that of Kinnear's fish-tail blade. Accordingly, Hughes' cutting edges were the mechanical equivalent of Kinnear's fish-tail blade. Therefore, the

Hughes patent discloses all of the essential elements arranged in the same relation and performing the same functions as the bit disclosed and claimed in the Kinnear Patent No. Re. 23,416.

88. A person of ordinary skill in the drilling bit art, being familiar with the Hughes Patent No. 1,204,157 could have substituted a conventional fish-tail blade such as that of the Greenhead bit for Hughes' cutting edges, thereby arriving at substantially the same result achieved by Kinnear, without the exercise of invention.

89. The Hughes Patent No. 1,204,157 was not considered by the Patent Office during the course of prosecution of either Original Patent No. 2,380,112 or Reissue Patent No. 23,416.

90. Neither of the patents in suit achieved commercial success.

## CONCLUSIONS OF LAW

[1-9] 1. Plaintiff has no cause of action against defendant for alleged breach of confidence (Paragraph 10 of the Complaint) for each of the following reasons:

(a) The essential elements of a cause of action for breach of confidence are

(i) possession by the plaintiff of knowledge or information which is not generally known.

(ii) communication of this knowledge or information by the plaintiff to the defendant under an express or implied agreement limiting its use or disclosure by the defendant, and

(iii) use or disclosure by the defendant of the knowl-

edge or information so obtained in violation of the confidence, to the injury of the plaintiff.

The plaintiff has the burden of proving each of these elements. In this case, plaintiff has failed to prove a single one of these essential elements. On the contrary, the record clearly shows that none of these elements existed.

(b) No cause of action for breach of confidence can accrue to the owner of a patent who has revealed the subject matter thereof to another, by reason of the use or publication by the other after issuance of the patent, of said subject matter, since the issuance of the patent constitutes a publication of its subject matter to the world. In this case, all of the information which Kinnear disclosed to defendant is contained in Patent No. 2,380,112, and plaintiff's sole complaint is that defendant used and published this information after the issue of the patent.

(c) No cause of action for breach of confidence can accrue to the owner of an alleged trade secret by reason of the use or publication of such secret by another, after the owner has revealed his secret to the public by the sale of articles incorporating the secret. In this case, all of the acts on the part of defendant of which plaintiff complains occurred after Kinnear sold the public bits incorporating his alleged trade secret.

(d) Plaintiff's claim is barred by the Texas two-year statute of limitation, Art. 5526, R.C.S.

(e) This being an action at law, plaintiff has the burden of proving that it has been damaged by defendant as an essential part of its cause of action. Plaintiff has failed to prove any such damage.

(f) The proper measure of damages in an action at law for breach of confidence is the plaintiff's loss of profits.

Plaintiff failed to prove that it lost any profits on account of any act of defendant. Moreover, plaintiff's business is new and unestablished and the prospective profits of such a business are too speculative to form the basis of an award of damages.

[10-15] 2. Plaintiff has no cause of action against defendant for alleged unfair competition (Paragraph 11 of the Complaint) for each of the following reasons:

(a) The essence of a cause of action for unfair competition is the palming-off of the defendant's goods as those of the plaintiff, thus injuring the reputation or business of the plaintiff by causing the public to believe that the defendant's goods are those of the plaintiff. Unless such a palming-off is alleged and proved by the plaintiff, there can be no recovery for unfair competition. In this case, plaintiff failed either to plead or prove that defendant palmed off any of its goods as those of plaintiff.

(b) This being an action at law, plaintiff has the burden of proving that it has been damaged by defendant as an essential part of its cause of action. Plaintiff has failed to prove any such damage.

(c) The proper measure of damages in an action at law for unfair competition is the plaintiff's loss of profits. Plaintiff failed to prove that it lost any profits on account of any act of defendant. Moreover, plaintiff's business is new and unestablished and the prospective profits of such a business are too speculative to form the basis of an award of damages.

[16-19] 3. Plaintiff has no cause of action against defendant for alleged violation of the anti-trust laws (Paragraph 12 of the Complaint) for the following reasons:

(a) Under the Federal anti-trust laws, 15 U.S.C.A. §§ 1-7, 15 note, the essential elements of a private civil action for treble damages are:

(i) a violation by the defendant of some specific provision of the Federal anti-trust laws with consequent injury to the public, and

(ii) injury to the business or property of the plaintiff by reason of such violation.

The plaintiff has the burden of proving each of these elements. In this case, plaintiff has failed to prove the existence of either of these elements.

(b) The Texas anti-trust laws make no provision for a private civil action for violation thereof. Moreover, no violation of the Texas anti-trust laws has been shown.

[20] 4. Plaintiff has no cause of action against defendant for alleged infringement of Patent No. 2,380,112 because the grant of a reissue patent extinguishes the original. Plaintiff No. 2,380,112 was extinguished by the grant of Re. 23,416. Therefore, plaintiff can predicate no claim on Patent No. 2,380,112.

[21-42] 5. In a patent infringement suit, the plaintiff cannot prevail unless the court finds the patent both valid and infringed. The plaintiff has the burden of proving infringement. Plaintiff has failed to prove that defendant has infringed any of the claims of Patent No. Re. 23,416. On the contrary, the record in this case clearly shows that, for one or more of the following reasons, all of the claims of the patent are limited to a specific form of combination bit and that these claims, as so limited, are not infringed by any of the accused bits:

(a) The claims of a patent define the scope of the

monopoly granted to the patentee. Every term recited in a patent claim is a limitation on the patentee's monopoly and nothing is an infringement which does not fall within the terms which the patentee has chosen to express his invention. The claims must be interpreted in the light of the specification, and cannot be construed to cover anything different from or greater than the invention disclosed in the specification. In view of these principles, the claims of Re. 23,416 can cover no more than the specific form of comination bit illustrated and described in the patent. Such a bit has a pair of disk-shaped outer roller cutters mounted on spindles extending outwardly from the opposite side faces of a fish-tail blade (with or without small rollers mounted in slots in the cutting edge of the blade): the bit also has two pairs of water courses through the bit body, the upper pair being positioned to discharge drilling fluid directly onto the top of the outer roller cutters and the lower pair being positioned to discharge drilling fluid down the front faces of the fish-tail blade, in contact therewith. None of the accused bits embodies this specific construction or anything like it. Therefore, none of the accused bits infringes any claim of the patent.

(b) The claims of a reissue patent must be for the same invention as that disclosed in the original patent, and any claim of the reissue which is not for the same invention as that disclosed by the original is void. Patent No. 2,380,112 disclosed nothing more than the specific form of combination bit described in subparagraph (a) above. Therefore, the claims of Re. 23,416 can cover nothing more than that specific form of combination bit and any claim purporting to cover more than that would be void.

(c) A patent owner is bound by the representations made by the applicant to the Patent Office during the prosecution of the patent as to the nature of his invention and the scope of his claims, where such representations were relied on by the Patent Office in granting the patent; and the patent owner is estopped from asserting a broader or more liberal interpretation of the claims of his patents in an infringement suit than the interpretation which the applicant gave to those same claims during the prosecution of the patent. Kinnear repeatedly told the Patent Office that his invention consisted of the particular form of combination bit described in subparagraph (a) above and the Patent Office relied on these representations in issuing the patents in suit. Plaintiff is bound by these representations and is estopped to assert a broader scope for the claims in this case than that urged by Kinnear in the Patent Office.

(d) Where an applicant represents to the Patent Office that certain additional claims are based on the subject-matter of other previously allowed claims, and the additional claims are allowed by the Patent Office on the strength of such representation and without further examination, the additional claims so obtained cannot be construed more broadly than the previously allowed claims and cannot be infringed by any device which does not also infringe the latter. Since Kinnear represented to the Patent Office that Claims 13-20 were "based on the subject matter of" previously allowed Claims 3-12, and the Patent Office thereupon allowed Claims 13-20 on the strength of this representation and without further examination, these claims cannot be construed more broadly than Claims 3-12 and cannot be infringed by any bit which does not also infringe Claims 3-12. Claims 3-12 are obviously limited

to the specific form of combination bit described in subparagraph (a) above and are not infringed by any of the accused bits. Therefore, Claims 13-20 must also be so limited and are likewise not infringed by any of the accused bits.

(e) Where the applicant has asserted and then abandoned certain claims during prosecution of the patent, the subject matter of the abandoned claims can not be revived and restored to the patent by reading such subject matter, by construction, into other claims which are allowed. During prosecution of Re. 23,416, Kinnear asserted claims reading directly on the accused Hughes cone and Reed cross-roller rock bits, but abandoned those claims when the Examiner refused to enter them on the ground that they were not supported by the disclosure. Accordingly, plaintiff cannot interpret any of the claims of the patent in such a way as to cover bits of this type.

(f) A patent claim which reads directly upon the prior art is invalid. A claim will not be so construed if any other construction is possible. The prior art of record in this case contains a great many bits with water courses so positioned as to discharged streams of drilling fluid directly onto the bottom of the hole, at or near the periphery thereof, without first hitting the cutters. Therefore, if the claims of the patent in suit were interpreted as covering the accused bits simply because they incorporate water courses so positioned, as plaintiff contends, the claims would read on all of the prior bits which had water courses similarly positioned, and would be invalid. In order to avoid this result, the claims must be limited to the specific combination of elements recited therein, which is described in subparagraph (a) above.

(g) Combination patents are patents in which the claimed invention resides in a specific combination or arrangement of elements, rather than in the elements themselves. Combination patents should be, they are difficult to obtain. If sustained, they should be, they are, confined strictly to the particular combination claimed. In order to infringe a claim of a combination patent, the accused device must incorporate all the elements of the claimed combination, and omission of a single element avoids infringement. Under the "doctrine of equivalents", a primary or pioneer patent may be held to be infringed by a device which, while it differs in some respects from the language of the claims, nevertheless functions in substantially the same way to perform substantially the same results. A combination patent, particularly one in a crowded art, is entitled to a very limited range of equivalents and is practically limited to the structure shown by the inventor. The doctrine of equivalents is never applied where there is an entire omission of a definite part of the claimed combination without anything being used to function in its place. Every claim of Re. 23,416 is for a combination of elements, the claimed combination consisting of, among other things, outer roller cutters and an inner blade type cutter (either with or without small rollers mounted in the blade). Since none of the accused drag bits have roller cutters or any equivalent thereof, and none of the accused cone and cross-roller bits have blades or any equivalent thereof, these bits cannot infringe any claim of the patent.

(h) Where the accused device is constructed in accordance with the teachings of the prior art and differs from the claimed invention in the very feature upon which patentability of the latter was predicated, there can be no

infringement. The accused combination bits are all constructed in accordance with the teachings of the prior art, and differ from Kinnear's alleged invention in the very feature of the latter which the Patent Office regarded as patentable, this being the way in which the outer roller cutters are mounted on the bit body. Kinnear mounted his outer roller cutters on spindles extending outwardly from the opposite side faces of the reduced lower portion of the body, whereas the accused combination bits follow the prior art in mounting in the outer roller cutters on the inner sides of a pair of downwardly extending legs. Therefore, none of the accused combination bits infringe any claim of the patent.

6. There being no infringement, plaintiff has no cause of action against defendant on Patent No. Re. 23,416.

[43] 7. Where an entire industry is affected by and concerned with the question of validity vel non of a patent, as is true in the case of the patent in suit, the Court should decide the validity question, and should not dispose of the suit on the ground of non-infringement alone.

[44-48] 8. Unless the subject matter of a patent involves both novelty and invention, the patent is invalid, since mere novelty, without invention is insufficient. The question of invention involves the whole of the prior arts and the patentee is charged with knowledge of all of the prior art extant at the time of his alleged invention, whether actually known to him or not. The mere exercise of the skill of the calling does not amount to invention, nor is it invention to combine old elements with no change in their respective functions. Kinnear did no more than to exercise the skill of the art in combining a group of old and well known elements with no change in their respective

functions, and produced nothing which another person of ordinary skill in that art could not have duplicated. Accordingly, what he did does not rise to the dignity of invention and the patent in suit is invalid for that reason.

[49, 50] 9. Where all of the essential elements claimed in a later patent are disclosed in a prior patent, arranged in the same relation and performing the same functions, the prior patent anticipates the later and the later patent is invalid. Accordingly, the patent in suit is anticipated by Hughes Patent No. 1,204,157 and is, therefore, invalid.

[51, 52] 10. The usual presumption of validity attaching to an issued patent disappears when it is shown that the Patent Office failed to consider the most pertinent prior art. The Patent Office failed to consider the Hughes Patent No. 1,204,157, as well as many other of the most pertinent references during the prosecution of the patent in suit. Accordingly, the patent is not entitled to the usual presumption of validity, and this conclusion is not affected by the fact that the patent was issued as the result of a suit under R.S. 4915.

[53] 11. The doctrine of "commercial success" has no application to the facts of this case since the patent in suit has not achieved commercial success. In any event, commercial success cannot take the place of invention.

12. Plaintiff's suit for alleged infringement of Patent No. Re. 23,416 must be dismissed for invalidity of the patent as well as non-infringement by defendant.

APPENDIX B-5

In The
**UNITED STATES DISTRICT COURT**
For the Eastern District of Texas, Beaumont Division

CIVIL ACTION NO. 2363

KINNEAR-WEED CORPORATION, *Plaintiff*,
v.
HUMBLE OIL & REFINING COMPANY, *Defendant*

## FINAL JUDGMENT

This cause having come on to be heard upon the pleadings, the evidence adduced at the trial, the arguments of counsel, and the briefs filed by both parties hereto and the Court having duly considered the same and having concluded that plaintiff is not entitled to recover on any of the causes of action asserted herein, and having made and filed appropriate Findings of Fact and Conclusions of Law, and having directed the entry of judgment for defendant, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That U. S. Patent No. Re. 23,416 is invalid and void;

2. That U. S. Patent No. Re. 23,416 has not been infringed by defendant, Humble Oil & Refining Company;

3. That Plaintiff, Kinnear-Weed Corporation, take nothing against defendant, Humble Oil & Refining Company, by reason of any of the causes of action asserted herein, and that said defendant go hence without day as to each and all of said causes of action;

4. That defendant, Humble Oil & Refining Company, recover its costs herein, such costs to be taxed against plaintiff, Kinnear-Weed Corporation for which execution may issue.

Dated: Oct. 10, 1956.

Sgd. LAMAR CECIL
United States District Judge

## APPENDIX B-6

### JUDGMENT.

Extract from the Minutes of September 22, 1958.

KINNEAR-WEED CORPORATION,
No. 16780.

versus

HUMBLE OIL & REFINING COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the Appellant, Kinnear-Weed Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

## Appendix C-1

**In the**

**UNITED STATES DISTRICT COURT**
**for the District of Columbia**

| | | |
|---|---|---|
| Clarence Wellington Kinnear, 1807 Hazard Street, Houston 6, Texas | | |
| Plaintiff | ) | Civil Action No. 1619-49 |
| v. | ) | |
| John A. Marzall, Commissioner of Patents of the United States, | ) | |
| Defendant. | ) | |

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Section 52 F.R.C.P., and the opinion of the Court heretofore filed herein, the Court finds the facts and states its conclusions of law thereon, as follows:

### FINDINGS OF FACT

1. This is an action under 35 U.S.C. 63 (R. S. 4915), in which plaintiff seeks an adjudication that he is entitled to receive a reissue patent pursuant to 35 U.S.C. 64 (R.S. 4916) containing claims 5 to 14, inclusive of plaintiff's reissue application, and an additional claim presented in the amended complaint which is based on claim 16 of the reissue application. The Board of Appeals of the Patent Office refused to grant plaintiff a reissue patent containing claims 5 to 14, inclusive, but did not pass on the addi-

tional claim presented in the amended complaint.

2. Plaintiff's invention relates to a rotary drill construction for oil wells. During the prosecution of plaintiff's original application, claims defining the entire drill structure were presented and finally rejected. Thereafter, claims covering the construction details of a roller cutter forming only part of the drill were presented, and the Patent Office gave plaintiff the option of appealing on the finally rejected claims or the roller cutter claims.

3. Plaintiff cancelled the claims directed to the entire drill structure and appealed on the roller cutter claims. After further proceedings the Board of Appeals of the Patent Office allowed two modified claims defining details of construction of the roller cutter and nothing more, and the original patent was issued with these claims.

4. Throughout the proceeding on the original application, both the Patent Office and the plaintiff acted on a record which was incomplete in a vital respect, and both made decisions and committed errors as a result thereof.

5. Had the record of the original application been correct, it is reasonable to infer that plaintiff would have given his attention to the perfection of valid claims on his disclosure for the entire construction of the drill which is now found to be patentable.

6. As a result of the above, plaintiff filed and relied on claims seemingly valid, suggested and approved by the Board of Appeals, which are now found to be invalid and which he would not have reasonably filed except for the omission of the invalidating patent in the record of the original application.

7. The whole course of proceedings in the Patent Office was permeated with error arising out of mutual mistake growing out of an omission in the record.

8. The claims to the entire drill structure were not deliberately cancelled from the original application. There was a vitally defective record causing the mistake out of which arose the error both in the prosecution of claims and in the cancellation of others.

9. Plaintiff filed his application for reissue and therein presented the claim of the original patent and new claims designed more closely to approach the definition of the real invention disclosed. It was established beyond question that the claims of the original patent were invalid and the Board of Appeals held the new claims defined invention and were patentable.

10. A comparison of the specification of the original patent with the claims of the reissue application clearly discloses that the latter are for the same invention intended to be secured by the original patent.

## CONCLUSIONS OF LAW

1. Plaintiff is not estopped to rectify the error in cancelling claims from the original application which arose out of mistake.

2. The theory of estoppel, based on the recapture of claims in a reissue application which were deliberately cancelled from an original application, has no application to the instant case.

3. Under the circumstances of this case, the plaintiff is entitled to relief because through mistake he failed to perfect and cancelled claims for the entire structure of the bit, in which the invention is embodied.

4. The Patent Office contributed to the mistake which was made during the pendency of the original application, and under the special circumstances of this case, the Commissioner has the authority and duty to grant amendments

which will correct the error.

5. It is unnecessary for the Court to consider whether the reissue application claims patentably distinguish from the claims cancelled from the original application because the estoppel has no application to the issues of this case.

6. Plaintiff is entitled to a reissue patent because of error which arose through "inadvertence, accident or "mistake" as provided for in the reissue statute.

7. A mistake was made of the kind contemplated by the statute and for which a court of equity should give relief.

8. The reissue claims are for the same invention as the original patent, being the same invention intended to be secured by the original patent as disclosed in the specification of the original patent.

9. The Court has jurisdiction of the case and of the parties, but has no jurisdiction to act on the additional claim presented in the Motion to Amend the Complaint and which is based on claim 16 of the reissue application, because this claim was not passed upon by the Patent Office.

DAVID PINE
Judge.

Dated:
February 9, 1951.

Submitted by:
JOHN W. MALLEY
Attorney for Plaintiff.

Approved as to form:
E. L. REYNOLDS and H. S. MILLER
Attorney for Defendant.

## APPENDIX C-2

95 Federal Supplement

**Kinnear v. Marzall, Commissioner of Patents.**
**Civ. No. 1619-49.**

**UNITED STATES DISTRICT COURT**
**District of Columbia**

Jan. 23, 1951.

Action by Clarence Wellington Kinnear against John A. Marzall, Commissioner of Patents of the United States to authorize the reissue of an invalid patent the claims of which were drawn to rotary drill construction for use in drilling of oil wells. The District Court Pine, J., held that where issuance of invalid patent by patent office resulted from omission from record of prior patent and omission caused mistake out of which arose the error, both in the prosecution of claim and cancellation of others, plaintiff was entitled to the reissue of patent on cancelled claim and since vitally defective record caused mistake out of which arose the error, plaintiff was not estopped from seeking relief requested.

Judgment entered for plaintiff on reissue claims 5 to 14 both inclusive.

Judgment for defendant on claim 16.

1. PATENT—141(6)

Where throughout original proceedings on original application both Patent Office and plaintiff acted on a record incomplete in a vital respect due to omission of a prior invalidating patents, and on appeal both plaintiff and board

of appeals, acting without knowledge of prior invalidating patent, made decisions and took action which was inconceivable either would have taken had they had knowledge of prior patents, plaintiff was entitled to a reissue patent on abandoned valid claims, and plaintiff was not estopped from seeking reissue. 35 U.S.C.A. §§ 63, 64.

2. PATENTS—141(1)

Reissue claims are for same invention as original patent if reissue fully describes in claims very invention intended to be secured by original patent and both claims and specifications must be considered in reaching such determination. 35 U.S.C.A. §§ 63, 64.

3. PATENTS—141(5)

District Court did not have jurisdiction to determine patentability of additional patent claim not passed on by Board of Appeal.

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John W. Malley, of Cushman, Darby & Cushman, Washington, D. C., for plaintiff.

E. L. Reynolds and H. S. Miller, Washington, D. C. for defendant.

PINE, District Judge.

This is an action under 35 U.S.C.A. § 63, R.S. § 4915, to authorize the reissue of an invalid patent pursuant to 35 U.S.C.A. § 64, R.S. § 4916. The claims are drawn to rotary drill construction for use in the drilling of oil wells. Plaintiff's original application contained 25 claims. They were rejected on the prior art. Amendments were filed, culminating in the final rejection of all claims. Thereafter still further amendments were filed. These covered only the construction details of a roller cutter forming part of the drill. They were not entered, on the ground that the

application was under final rejection and the amendments did not place the application in condition to be passed for issue, and plaintiff was advised that he had the option of basing an appeal either on (1) the claims as finally rejected or on (2) the claims contained in the last amendments. On the record in the case as then made, it appeared to plaintiff that he would prevail on appeal by adopting the second alternative, and thereby would obtain patent protection. Accordingly, he appealed on the claims contained in the last amendments, and canceled the others drawn to the entire structure.

The Board of Appeals confirmed his view in this regard, and held that there was a patentable difference between the plaintiff's device and that disclosed by the prior art, but that his claims failed to define the difference. Acting on this holding, plaintiff submitted two new claims intended to cure the defect, and the Board held that they, if properly presented, should be entered and allowed. Whereupon plaintiff canceled the claims on appeal, substituted the claims approved by the Board, and patent was issued thereon. These claims, two in number, like the canceled claims from which they evolved, defined the details of construction of the roller cutter, and nothing more. They likewise appeared on the record made to be sufficient to afford patent protection to the plaintiff; but it soon developed that he was in error in this respect and that the patent issued to him was inadequate. He thereupon filed his application for reissue, presenting the two original patented claims and other claims of like nature, and also new claims designed more closely to approach the definition of the real invention disclosed. Then for the first time he was met by the citation of a patent, not previously in the record nor cited in the original proceedings, which

established beyond question that his original patent for the roller cutter was invalid. The original patented claims and others of like nature were accordingly rejected on the newly cited patent, and they have been abandoned.[1] However, the Board of Appeals held that the new claims of plaintiff defined invention and were patentable, but rejected them on the ground of estoppel.

Plaintiff thereupon brought this action to authorize the reissue of an invalid patent under 35 U.S.C.A. § 64, supra, which provides that "Whenever any patent is wholly or partly inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, * * * the commissioner shall, on the surrender of such patent * * * cause a patent for the same invention * * * to be reissued to the patentee * * * *."

There is no dispute that the prior patent is invalid, and that it is invalid by reason of an "insufficient specification," [2] and by claiming more than he had a right to claim as new." There is also no dispute as to the patentability of plaintiff's claims, and that question is not before me.

The dispute is whether the error arose by "inadvertence, accident, or mistake," and whether the application is for the same invention. I shall discuss the disputed issues in the order named.

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1 Two other claims were likewise rejected on the prior art, but they have been abandoned and have no relevancy to the questions here under discussion.



2 In the sense used in the statute, specification covers both specification and claims. American Automotoneer Co. v. Porter, 6 Cir., 232 F. 456.

[1] It appears from the facts above set forth that throughout the proceeding on the original application, both the Patent Office and the plaintiff acted on a record which was not only incomplete, but incomplete in a vital respect, and both made decisions and committed errors as a result thereof. To be sure, as it now turns out, the examiner acted correctly in refusing to enter the appealed claims on the roller cutter, notwithstanding this defective record; but the plaintiff, in exercising his option as to the course he should pursue on appeal, chose one fatal to his rights because of such defective record. It is not unreasonable to infer that, had the record been correct, plaintiff would not have prosecuted further his roller cutter claims, but would have given his attention to the perfection of valid claims on his disclosures for the entire construction which are now found to be patentable. On appeal, both the plaintiff and the Board of Appeals, acting without knowledge of the prior invalidating patent, made decisions and took action which it is inconceivable either would have taken had they had knowledge of the prior patent. As a result, plaintiff now finds himself in the position of having filed and relied on claims seemingly valid, suggested and approved by the Board of Appeals, which now are found to be invalid and which he would not have reasonably filed except for the omission in the record. Thus the whole course of the proceedings was permeated with error arising out of mutual mistake growing out of an omission in the record, and causing issuance of the invalid patent. I am therefore of the opinion that this is a mistake of the kind contemplated by the statute and one for which a court of equity should give relief.

Defendant, however, contends that the remaining claims

on the reissue application are of substantially the same scope as the canceled claims, and that plaintiff therefore is estopped from asserting that his error arose by "inadvertence, accident, or mistake." In this connection he relies on In re Guastavino, 83 F.2d 913, 23 C.C.P.A., Patents, 1179, G H Rim Co. v. Firestone Steel Products Co., 6 Cir., 29 F.2d 825; and In re McKesson, 56 App. D.C. 401, 11 F.2d 999. These hold that where a claim is deliberately canceled in the original application, it cannot be recaptured in a reissue application, the theory being that the deliberate cancelation precludes a holding of "inadvertence, accident, or mistake."

But this theory, though convincing in some circumstances, has no application in others such as are present in the instant case, and I can find no basis for concluding that the authorities cited are apposite. Here we have a vitally defective record causing the "mistake" out of which arose the "error," both in the prosecution of claims and in the cancelation of others. To hold that plaintiff is estopped under such circumstances would thwart the statute, for the relief provided thereby to rectify error in presenting claims arising out of mistake would be nullified upon the concomitant error in canceling claims arising out of the same mistake. Or, as stated in Florence-Mayo Nuway Co. v. Hardy, 4 Cir., 168 F.2d 778, 784, in an opinion by Judge Parker, "It would seem absurd * * * to say that under the statute patentee is entitled to relief because of inadvertence and mistake in failing to claim his invention, but, under a court-made rule, must be denied any real relief because through the same inadvertence or mis-

[1] These are the words of the statute, 35 U.S.C.A. [illegible]

take he canceled a claim in which the invention was embodied."

The Supreme Court, in Morey v. Lockwood, 8 Wall. 230, 75 U.S. 230, 19 L.Ed. 339, in passing upon a somewhat analogous situation, also gives support for the view here expressed. There the applicant was induced by the Patent Office to narrow his claims and patent was issued thereon. Then it was discovered that the patent cited by the Patent Office was no objection to the original broad claims and a reissue was sought on claims in substantially their original form. These were allowed, and patent issued thereon. The reissued patent was attacked as invalid, but the Supreme Court, in sustaining it, noted that the Patent Office, as in this case, contributed to the mistake, and held that "the Commissioner had full authority to grant the amendment; and, under the special circumstances of the case, it would seem to have been a duty, as the inventor was led into the error by himself, * * *." See also In re Crowell, 81 F.2d 402, 23 C.C.P.A., Patents, 859, which sustain the views set forth here in a case similar to the one at bar.

Although plaintiff argues convincingly on the fact that the reissue claims patentably distinguish from the original canceled claims in the recitation of features and elements found by the Board of Appeals to define invention, it is unnecessary for me to reach this point under my view of the law as above expressed. I am therefore of the opinion that estoppel has no application to the issues in this case.

[2] On the second point, i.e., whether the reissue claims are for the "same invention" as the original patent, little need be said. The law, generally stated, is well settled by the Supreme Court, which has declared that they are for

the same invention "if the reissue fully describes and claims the very invention intended to be secured by the original patent".[4] Both the claims and specification must be considered in reaching this determination.[5] In discussing this point, defendant omits reference to the specification of the original patent, and concerns himself solely with the claims of that patent in support of his contention that the reissue claims are not for the same invention. Therein lies his error, for a comparison of the specification of the original patent with the reissue clearly discloses, without the necessity for further particularization, that the latter is for the same invention under the definition above set forth. The case cited by defendant[6] is distinguishable on the facts and to a large extent is concerned with whether the cancelation of certain claims was due to inadvertence, accident, or mistake.

Finally, in this connection it is significant to observe that the Board of Appeals in this case did not reject on the ground of failure to claim the same invention although that ground was given by the examiner, but pitched its decision on estoppel.

[3] So far as the additional claim 16 is concerned, this court has no jurisdiction to act thereon, because the same was not passed upon by the Board of Appeals. Cherry-Burrell Corp. v. Coe, 79 U.S. App. D.C. 124, 143 F.2d 372.

Judgment will therefore be entered for plaintiff on reissue claims 5 to 14, both inclusive. Judgment will be entered for defendant on claim 16. Counsel will submit the same along with findings of fact and conclusions of law.

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4 U. S. Industrial Chemicals, Inc. v. Carbide, etc., Corp., 315 U.S. 668, 675, 62 S.Ct. 839, 843, 86 L.Ed. 1105.

5 In re Mayo, 129 F.2d 700, 29 C.C.P.A., Patents, 1192; Florence Mayo Nuway Co. v. Hardy, supra.

6 In re Hicks, 58 App.D.C. 293, 29 F.2d 879.

## APPENDIX C-3

**In the**
**UNITED STATES DISTRICT COURT**
**for the District of Columbia**

Civil Action No.
1619-49

Clarence Wellington Kinnear,
1807 Hazard Street,
Houston 6, Texas
Plaintiff
v.
John A. Marzall,
Commissioner of Patents
of the United States,
Defendant.

### JUDGMENT

This action came on to be tried before the Court, and the Complaint having been amended by motion at the trial, and the evidence adduced by the parties having been heard, and the Court having made its findings of fact and conclusions of law, it is hereby:

Adjudged, that plaintiff is entitled, according to law, to receive a patent for his invention as specified in claims 5 to 14, inclusive of the reissue application, and the Commissioner of Patents is authorized to issue such a patent upon plaintiff filing in the Patent Office a copy of this adjudication and otherwise complying with the requirements of law, and that the complaint be dismissed as to the additional claim based on claim 16 of the reissue

application, which was presented in the amended complaint with costs to defendant.

(sgd.) DAVID PINE
Judge

Dated:
February 9, 1951
Submitted by:
JOHN W. MALLEY
Attorney for Plaintiff.
Approved As To Form:
E. E. REYNOLD and H. S. MILLER
Attorney for Defendant.

## APPENDIX G-1
### Constitution Of The United States
Amendment V - Due Process of Law

* * * nor be deprived of life, liberty, or property, without due process of law; * * *.

## APPENDIX G-2
### Title 28 U.S.C. Sec. 455

§ 455. Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. June 25, 1948, c. 646, 62 Stat. 935.

## APPENDIX G-3

### Federal Rules of Civil Procedure, Rule 60(b)

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the Court. Writs of coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as pre-

scribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

## APPENDIX G-4

Title 28 U.S.C. Sec. 1254(1)

§1254. Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *. June 25, 1948, c. 646, 62 Stat. 928.

## APPENDIX G-5

CONSTITUTION OF THE UNITED STATES
ARTICLE I, Section 8

Section 8. The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

# APPENDIX G-6

## MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

### Title 15 U.S.C. Sec. 1

Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or cor-

porations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

## TITLE 15 U.S.C. Sec. 2

Sec. 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 2, Stat. 209.

## TITLE 15 U.S.C. Sec. 15

Sec. 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.

## DISTRICT COURT: JURISDICTION-COMMERCE AND ANTI-TRUST

### TITLE 28 U.S.C. Sec. 1337

Sec. 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

### TITLE 28 U.S.C. Sec. 1338 (a), (b)

Sec. 1338. Patents, copyrights, trade-marks and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws. June 25, 1948, c. 646, 62 Stat. 931.

### TITLE 28 U.S.C. Sec. 1400 (b)

Sec. 1400. Patents and copyrights

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. June 25, 1948, c. 646, 62 Stat. 936.

## APPENDIX G-7

## REVISED CIVIL STATUTES OF THE STATE OF TEXAS (VERNON'S)

## LIMITATION OF PERSONAL ACTIONS

Art. 5526. (5687-98, 3354-63, 3203-12) Actions to be commenced in two years.

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted. Acts, 1841, p. 163; G.L. vol. 2, p. 627.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of

action shall be considered as having accrued at the death of the party injured. Acts 1897, p. 42; Acts 1841, p. 163; Acts 1852, p. 128; P. D. 4604; G.L. vol. 10, p. 4066, G.L. vol. 2, p. 627; G.L. vol. 3, p. 1006.

8. Actions of forcible entry and forcible detainer. Art. 5529. (5690, 3358, 3207) All other actions barred when.

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

## APPENDIX G-8

### REMEDIES FOR INFRINGEMENT OF PATENT, AND OTHER ACTIONS

### TITLE 35 U.S.C. Sec. 281

Sec. 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c. 950, Sec. 1, 66 Stat. 812.

### TITLE 35 U.S.C. Sec. 282

Sec. 282. Presumption of validity;

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

## TITLE 35 U.S.C. Sec. 283

Sec. 283. Injunction

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable. July 19, 1952, c. 950, Sec. 1, 66 Stat. 812.

## TITLE 35 U.S.C. Sec. 284

Sec. 284. Damages

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances. July 19, 1952, c. 950, Sec. 1, 66 Stat. 813.

## APPENDIX H-1.

FILED
17th day of May, 1961.
Clara R. James
Deputy Clerk of the United
States Court of Appeals

**IN THE UNITED STATES COURT OF APPEALS**
**For The Fifth Circuit**

NO. 16780

KINNEAR-WEED CORPORATION,
Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
Appellee.

**Appeal from the United States District Court for the Eastern District of Texas**

(May 17, 1961)

SUPPLEMENTAL OPINION

Before RIVES, JONES and WISDOM, Circuit Judges.

RIVES, Circuit Judge:

It now appears to the Court that the final sentence of the opinion entered in this cause on the 22nd day of September 1958, reading "The judgment of the district court is therefore affirmed" did not carry out the theretofore clearly expressed opinion of this Court, but constituted a clerical mistake which should be corrected. A pet-

tion for certiorari pending but not ruled on does not deprive this Court of jurisdiction to make the necessary correction. See 28 U.S.C.A. 125; Rule 38 of the Supreme Court. Nor has time or the expiration of the term affected the power of this Court to make such correction. See 28 U.S.C.A. 452; *Hines v. Royal Indemnity Co.*, 6 Cir. 1958, 253 F. 2d 111, 113; *National Comics Publications v. Fawcett Publications*, 2nd Cir. 1952, 198 F. 2d 927; Compare Rule 60(a) F.R.C.P.; *American Trucking Association v. Frisco Co.*, 1958, 358 U.S. 133, 145. Said final sentence of the opinion is therefore withdrawn and, in lieu thereof, there is substituted the following: "The judgment of the district court is, therefore modified by striking therefrom that part which declares that U. S. Patent No. Re. 23,416 is invalid and void, and, as so modified, the said judgment is affirmed." The Clerk of this Court is directed to recall the mandate, and to enter a corrected judgment in accordance with this opinion, and issue a corrected mandate forthwith.

Enter for the Court:

RICHARD T. RIVES, Judge.

## APPENDIX H-2

## UNITED STATES COURT OF APPEALS
### For The Fifth Circuit

October Term, 1957

NO. 16,780

D. C. Docket No. 2363 Civil

KINNEAR-WEED CORPORATION,
Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
Appellee.

**Appeal from the United States District Court for the Eastern District of Texas**

Before RIVES, JONES and WISDOM, Circuit Judges.

### CORRECTED JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause be, and the same is

hereby, modified by striking therefrom that part which declares that U. S. Patent No. Re. 23,416 is invalid and void, and, as so modified, that said Judgment be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellant, Kinnear-Weed Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 17, 1961

Issued: May 17, 1961

CORRECTED JUDGMENT filed and Entered May 17, 1961 (Copy of Corrected Judgment Issued as Mandate—May 17, 1961)

## APPENDIX H-3

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 16,780

KINNEAR-WEED CORPORATION,
Appellant,

versus

HUMBLE OIL AND REFINING COMPANY,
Appellee.

**Appeal from the United States District Court for the Eastern District of Texas**

Before RIVES, JONES and WISDOM, Circuit Judges.
PER CURIAM:

UPON CONSIDERATION of the application of appellant for stay or recall of mandate, it appears that the corrected judgment of this Court was issued as its mandate on May 17, 1961, that no injury resulted to the appellant from such action, and that no sufficient cause has been shown for the recall of such mandate. The application is therefore,

DENIED.

Dated: June 12, 1961

ORDER DENYING STAY AND/OR RECALL OF MANDATE—Filed June 12, 1961.

Office Supreme Court U.S.
FILED
NOV 16
JOHN F. DAVIS, CLERK

NO. 314

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

KINNEAR-WEED CORPORATION, *Petitioner*

*v.*

HUMBLE OIL AND REFINING COMPANY,
*Respondent*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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*Counsel for Petitioner*

NO. 314

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

KINNEAR-WEED CORPORATION, *Petitioner*

*vs.*

HUMBLE OIL AND REFINING COMPANY,

*Respondent*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Kinnear-Weed Corporation, Petitioner prays that this Court grant rehearing of its order of October 23, 1961, denying the petition for writ of certiorari filed and docketed August 12, 1961, and that a writ of certiorari issue to review all judgments, orders, and decrees for Respondent and against Petitioner in the above-entitled case as prayed for in the petition filed August 12, 1961 herein.

## QUESTIONS PRESENTED

Petitioner reasserts its petition in all respects filed herein, August 12, 1961, and, in addition thereto, under Rule 58 of the rules of this Court presents and requests this Court to review the following substantial grounds available to petitioner although not previously presented to show to this Court that all judgments, orders, and decrees in this case for Respondent and against Petitioner are illegal, clearly erroneous, unjust and should be reversed and appropriate relief granted to your petitioner as prayed for herein and said Petition and to which Petitioner may be entitled.

1.

This is a patent case involving—"a pair (two) small holes"—in a well drilling bit. It is a legal question whether or not—a pair (two) small upper holes"—are included in the patent "*claims*" of Petitioner's Patent Re 23,416 to determine validity, patent infringement, and related charges involving said patent.

After more than eight (8) years of continuous litigation the Court of Appeals has finally reversed the District Court's judgment which had held Petitioner's patent "invalid and void". The undisputed and uncontested evidence in this case shows that Respondent, through its agents and engineers, illegally filed U. S. Applications for patents with false oaths on the subject-matter of "jet bits" and "jet drilling" with full knowledge and use of Petitioner's "jet bit" inventions disclosed and "*claimed*" in its now adjudged valid patent. The expertness of the Patent Office had held and cited Petitioner's patent as prior invention over Respondent's said illegal applications for patent on the subject-matter of "jet bits" and "jet drilling". The Supreme Court has held, that the administrative agency (patent office) is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies (WILLIAMS vs. UNITED SHOE MACH. CORP., 121 F2d 273, CCA 6 (1941), aff'd. 316 U.S. 364, 86 LEd 1537 (1942).

There is no question that Petitioner's Patent discloses and claims the inventions of "jet bits" by which "jet drilling" is performed. The total evidence of both Respondent and Petitioner in this case agree that "jet bits" have been universally adopted and have "REVOLUTIONIZED" the oil and gas well drilling industry because the "jet bits" drill up to five (5) times faster than all prior art bits and have saved

staggering sums in the drilling of wells by the well drilling industry of which the public is the recipient in the cheapness and adequate supply of petroleum products. In such a highly competitive industry some one had to invent the "jet bit" because of its importance and Petitioner's Kinnear patent is the only patent issued by the Patent Office claiming the inventions in "jet bits". The Court of Appeals in reversing the District Court as a matter of law has held the Petitioner's patent is different than and has overcome all prior art bits cited by Respondent as anticipation of Petitioner's patent. The Court of Appeals reversed the District Court on its judgment that Petitioner's patent was "invalid and void" and by so doing the Court of Appeals reversed all of the Findings of Fact, Conclusions of Law and judgment pertaining to the District Court's incorrect interpretation of Petitioner's patent including patent infringement because the District Court could not correctly rule on patent infringement since the Court of Appeals has ruled that the District Court did not correctly interpret Petitioner's patent. Should the Supreme Court allow and permit the Court of Appeals to incorrectly affirm the judgment of the District Court which decreed

> "2. That U. S. Patent No. Re. 23,416 has not been infringed by defendant, Humble Oil & Refining Company;"

where the Court of Appeals reversed the judgment of the District Court on its incorrect interpretation of Petitioner's patent that said patent was "invalid and void"?

II.

There is a conflict within the opinions of the Court of Appeals which held

> "We agree with the District Court that appellee has not infringed appellant's patent." (259 F.2d 402, Per Curiam Opinion 266 F.2d 352)

And, the Court of Appeals made a conflicting opinion quoted below with its opinion above upon the same question of infringement of Petitioner's patents and cannot base its judgment or affirm the judgment of the District Court upon said conflicts of its opinions. A portion of the opinion quoted below is in conflict with the opinion quoted above.

> "Further, we agree with the disposition by the District Court of the claims *other than for patent infringement.*" (259 F2d 402).

The Court of Appeals cannot "*agree*" with the District Court in one part of its opinion and "disagree" with the District Court in another part of its opinion on the question of patent infringement, that is, "appellee has not infringed appellant's patent", and, hold its judgment and affirm the judgment of the District Court for Respondent and against Petitioner. This is a conflict within the Opinion of the Court of Appeals which nullifies its judgment and the Supreme Court should resolve this conflict and reverse the judgment of the Court of Appeals as a matter of law. The Court of Appeals *disagreeing* with the disposition of the District Court on the claim of patent infringement cannot affirm the District Court's disposition of the claim of patent infringement upon which the judgment of the District Court is based, and then affirm the judgment of the District Court. It is an error as a matter of law for the Court of Appeals to affirm the judgment of the District Court with which it "*disagrees*". Should the Supreme Court allow the illegal judgment for Respondent and against Petitioner to stand where there is conflict within the opinion of the Court of Appeals upon the question of infringement of petitioner's patents? Should the Supreme Court allow the Court of Appeals to illegally affirm the judgment of the District Court with which it disagrees on the disposition of the claim of patent infrngement?

## III.

Petitioner has been denied the right to have the fact finding body (Judge or Jury) weigh the evidence and inferences and to give petitioner the benefit of doubts which the fact finding body might give petitioner had the Trial Judge known or correctly ascertained petitioner's patent was a valid patent, which the Circuit Court determined it to be by its memorandum opinion of May 17, 1961, wherein the Circuit Court ruled "that the judgment of the District Court in this cause be, and the same is hereby modified by striking therefrom that part which declares that U. S. Patent No. Re 23,416 is invalid and void, and, as so modified that said judgment be, and it is hereby, affirmed." (Petition for certiorari, pp. 141-2).

Thus the Circuit Court struck down the judgment of the Trial Court that the patent was "invalid and void".

The Trial Court in its finding of fact No. 3, clearly pointed out that the validity of the patent was inextricably involved with the questions of breach of confidential relationship, unfair competition, patent infringement, and violation of Federal and Texas Anti-trust law.

The finding No. 3 reads:

> "Plaintiff charges defendant with breach of a confidential relationship, unfair competition, patent infringement and violation of the Federal and Texas Anti-trust laws. All these claims involved, and are inextrically connected with, the above mentioned two Kinnear patents, Nos. 2,380,112 and Re 23,416."

Since the questions involved are inextricably connected and involved with the question of the validity of the patent it is obvious that had the trial Court known, or determined said patent was valid, the trial court might and petitioner could, in all reasonableness expect the trial court to give more credence to petitioners evidence and expert opinions

and inferences to be drawn therefrom, in which event he could have in the light of the validity of the patent, reasonably cast the doubts to the side of petitioner, and the judgment would have been in favor of petitioner.

By refusing to reverse the whole cause for determination of the faces in the light of the validity of the patent petitioner is denied the right to have the benefit of the judgment of the trial judge when weighing the evidence in the light of the validity of the patent.

IV.

The trial court's judgment was affirmed even though it was based on findings made under a misapprehension of the law applicable thereto, on the basis that there was no infringement. The trial court found that petitioner's patent was anticipated by some approximately fifty-eight (58) prior art patents and publications. (See finding 76). The Court of appeals' opinion, last two (2) pages (Petition for certiorari pp. 71-72), sets out this finding and in the next to the last paragraph says that the two smaller ducts—not claimed as part of petitioners patent—are not excluded by petitioner's claims, and "So construed, these two smaller ducts are a part of the combination in which appellant's drill was expected to operate." Then the very next conclusion of the Court of Appeals followed—"We agree with the District Court that appellant (appellee) has not infringed appellee's (appellant's) patent."

Then the Court of Appeals in its last paragraph stated that "The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the form of combination bit shown in the patent."

On rehearing the Court of Appeals was convinced that its holding that anticipation by the prior art was not shown by the exhibiton of the two smaller holes, which were not

even claimed to be patentable, and ruled: "We do not intend to read into the claims of appellant's patents, as limitations of that patent any part of the drawings or of the specifications not expressed or necessarily referred to by implication in those claims."

Thus, the Trial Court like the Court of Appeals on original opinion was of the belief that petitioner's claims were anticipated by the prior art because the drawing—not claims—show the two small upper holes. The principal reference upon which Respondent relied to anticipate the inventions contained in the "*claims*" of Petitioner's patent Re 23,416 amongst the numerous prior art bits cited by Respondent was the Patent to Hughes 1,204,157 (See Finding 76). Finding 87 in comparing Hughes to Re 23,416 exemplified the Hughes Patent and found Hughes to contain as "essential elements"—a pair (two) small upper holes or ducts—which said District Court held were also disclosed and "*claimed*" in the "*claims*" in the Kinnear Re 23,416 to show there could be no infringement since Hughes anticipated Kinnear Re 23,416, and, the pertinent portion of finding 87 reads:

> "87. Hughes Patent No. 1,204,157, granted in 1916, discloses a drilling bit ***** The bit is provided with two pairs of water courses, *one pair* (two smaller upper holes or ducts of Re 23,416) directing streams of drilling fluid onto the tops of the outer roller cutters, ***** Therefore, the Hughes patent discloses all of the *essential elements* arranged in the same relation and performing the same functions as the bit disclosed and *claimed* in the Kinnear Patent No. Re. 23,416."

The Court of Appeals followed this reasoning of the Trial Court in its original opinion and ruled Re 23,416 was both invalid and non-infringed by Respondent by stating—"So construed, these two smaller ducts are a part of the combination in which appellant's drill was expected to operate".

The Court of Appeals later found it was in error and corrected its original opinion on rehearing by ruling—"We do not intend to read into the claims of Appellant's patents, as limitations of that patent any part of the drawings or of the specifications not expressed or necessarily referred to by implication in those claims". The Court of Appeals stated in its original opinion which it did not change that—"Appellant emphasizes that none of the *claims* of the patent (Re. 23,416) include these two smaller ducts. *That is true.*"—so none of the invalidating patents or findings on infringement of the *claims* of Re 23,416 have been correctly interpreted by the Trial Court. Its mis-intepretation of said *claims* as compared to the accused infringing bits still stands. The Court of Appeals corrected its misinterpretation but unless the Cause is reversed the Trial Court will never get a chance to reverse its erroneous belief that the two upper small holes constituted part of the "*claims*" and as such was anticipated by the prior art, and correct its enoneous belief that the patent "*claims*" are not infringed.

The above quotation clearly points out the incorrect interpretation placed by the Trial Court upon the—two small upper holes or ducts—as being an "essential element" included in the combination of parts contained in all of the "*claims*" of Re 23,416 and upon which the Trial Court concluded that none of the accused infringing bits could infringe said "*claims*" of Re 23,416.

A correct interpretation of the "*claims*" must be had to determine the question of patent infringement as the "*claims*" are the part of a patent that are infringed. A correct interpretation of the "*claims*" without the—"pair (two) smaller upper holes; called ducts or water courses"—makes out a clear case of patent infringement against the accused infringing bits made and used by Respondent, and, the District Court should have so held.

Thus, the Trial Court in arriving at his judgment applied

the incorrect rule of law—the validity of the patent being a law question.

The holding by the Court of appeals is similar to the holding where the issue is defendant's negligence and the Trial Court might rule that "Defendant is not negligent and therefore plaintiff is not entitled to recover"; and the Appellate Court would rule that the Trial Court's finding is modified by striking therefrom that part which declares, "Defendant is not negligent", and as so modified is affirmed.

Thus, when the Trial Court, under the holdings of this Court, was required to determine as a matter of law whether petitioners patent was valid, made an incorrect adjudication of the question of validity and erroneously determined that petitioner's patent was invalid and void, the die was cast. The Rubicon had been crossed—there was no turning back—the next conclusion was inevitable—it followed as the night, the day, that there was no infringement—How could there be—there was no patent to infringe!

The erroneous conclusion by the Trial Court that petitioners patent was invalid forced the further conclusion of no infringement.

Now that the Court of Appeals has passed on the question of validity of petitioner's patent and has struck down the Trial Court's finding of invalidity it likewise, should have struck down the finding of non-infringement because non-infringement was the inevitable result of the finding of invalidity, and the Court should have reversed this cause for retrial in the light of the validity of the patent.

Petitioner is entitled to a new trial before a Court which has the benefit of the knowledge that petitioner's patent is "not invalid and void"; and who, therefore, realizes that he is not "forced" to find non-infringement.

On new trial the Trial Court with the knowledge of the validity of the patent can and will weigh the evidence, ob-

serve the witnesses, and evaluate the prior art in view of the Court of Appeals' holding on rehearing that, "we do not intend to read into the claims of appellant's patents, as limitations of that patent any part of the drawings or the specifications not expressed or necessarily referred to by implication in those claims."

Only by a new trial can petitioners rights and claims be fairly evaluated and justice be administered by rightly dividing the word of truth, that petitioner's patent is valid—that infringement may or may not exist, but it will not be a foregone conclusion until all the evidence is in and weighed under correct rules of Law.

The Trial Court having tried this cause on an incorrect theory—that the patent was invalid—did not give this petitioner a trial according to law—but rather a trial according to a mis-interpretation of the Law. For instance, the same as if the Trial Court had held there was no infringement shown because petitioner did not prove respondent negligent in what it did and therefore, no infringement was proved.

Judgment cast in error and ignorance is no less onerous than judgment cast in venality and vindictiveness, though both are a travesty on justice.

A new trial would seem to be in order if justice is to be given a fair opportunity to operate under, and within the realm of, correct applicable rules and theories of patent law.

## V.

If the Court of Appeals' holding in its corrected judgment that the District Court's finding of invalidity should be modified "by striking therefrom that part which declares U. S. Patent No. Re. 23,416 is invalid and void" is not a holding by the Court of Appeals that petitioner's patent is valid, then the Court of Appeals committed prejudicial error for this Court has ruled that in patent cases this Court must determine whether the patent is valid.

We believe the Court of Appeals in its corrected judgment held petitioner's patent valid but if it did not so hold then it certainly did not hold it invalid.

Therefore, if the Court of Appeals' opinion is to be construed as not determining the validity of the patent this cause should be reversed and a determination of that question made. See GREAT ATLANTIC & PACIFIC TEA CO. v SUPERMARKET EQUIPMENT CORP., 340 U.S. 147, 158 (95 L.Ed. 163) at pages 154 and 156.

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

### I.

The Court of Appeals reversed the judgment of the District Court which held petitioner's patents "invalid and void". The District Court did not understand that the patent contained invention as evidenced by the Court's holding said patents "invalid and void". The Court of Appeals reversal of the District Court's holding demonstrates that the District Court did not correctly interpret petitioner's patents. In reversing, the Court of Appeals necessarily reversed all findings of fact, conclusions of law and judgment of the District Court in all respects pertaining to petitioner's patents including the erroneous conclusion of invalidity of said patents. The Court of Appeals thereby committed grievous prejudicial error in affirming the judgement of the District Court that respondent has not infringed petitioner's patents. Reversal of the District Court's erroneous opinion that the patent was invalid and void would, it seems, necessarily call for a reversal of the District Court's holding of non-infringement, since the holding of non-infringement would have to follow a holding of invalidity; since, if there is no valid patent there certainly could be no infringement. Therefore, a new trial should be granted and the facts weighed in the light of validity of the patent.

II.

The Court of Appeals in its Supplemental opinion and corrected judgment dated May 17, 1961, reversed the judgment of the District Court which held Petitioner's U. S. Patent No. Re. 23,416 invalid and void", and by so doing, the Court of Appeals reversed and invalidated the "entire" judgment of the District Court due to the fact that the District Court misinterpreted the claims of petitioner's patents as not containing invention and the Court of Appeals is in error because the District Court based its entire findings of fact, conclusions of law and judgment that "all" of petitioner's claims charged against respondent "involved, *and are inextricably connected with the two Kunican Patents* 2,380,112 or reissue thereof Re. 23,416 as per finding of fact 3 of the District Court. The Court of Appeals as a matter of law is in error in its modified corrected judgment holding the remaining portion of the judgment of the District Court affirmed because the Court of Appeals invalidated all of the Findings of Fact, Conclusions of Law, and Judgment of the District Court which the District Court found in Finding 3 to be involved and inextricably connected with petitioner's patents. The Court of Appeals in its modified judgment cannot affirm the remaining portion of said judgment of the District Court because said remaining portion of said judgment is based *"solely"* upon the District Court's incorrect interpretation of petitioner's patents, therefore, the Court of Appeals cannot legally affirm the remaining portion of said judgment which is based upon the findings of fact and conclusions of law of the District Court that the Court of Appeals invalidated and reversed by striking from the District Court's judgment that part which held petitioner's patents "invalid and void".

III.

The Court of Appeals, if its holding is to be construed

is not passing upon the validity of petitioner's patent and holding it valid, when it struck down the Trial Court's finding of invalidity then the Court of Appeals committed serious prejudicial error in not determining whether petitioner's patent is valid and failed and refused to follow this the Supreme Court's rule that validity must be determined. For this error this cause should be reversed and a new trial granted.

IV

The Court of Appeals cannot agree with the District Court that respondent has not infringed petitioner's patents in one part of its opinion and disagree with the District Court on the disposition of petitioner's claim of patent infringement in another part of its opinion. This is a conflict within the opinion of the Court of Appeals and will not sustain the judgment of the Court of Appeals for respondent and against petitioner that respondent "has not infringed petitioner's patents", and further, the Court of Appeals is in error as a matter of law in affirming the judgment of the District Court with which it disagrees on the claim of patent infringement because the opinion of the Court of Appeals in disagreeing stated.

> "Further, *we agree* with the disposition by the District Court of the claims *other than for patent infringement.*"

This is a holding of infringement. The Court had held the District Court in error in its holding of invalidity and by the above quoted holding of the Court of Appeals the Court of Appeals says, in effect that it disagrees with the District Court's holding that there was no infringement. Therefore, the Court of Appeals after reversing the District Court's holding of invalidity and disagreeing with the District Court's finding of non-infringement should have reversed for trial rather than affirm, and in failing to do so committed grievous prejudicial error.

## CONCLUSION AND PRAYER

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit, and that this cause be reversed for trial and for such further relief, either in law or equity, to which petitioner's may be entitled.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, petitioner in this above entitled case, hereby certify that the foregoing "PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI" is presented in good faith and not for delay and is

restricted to grounds specified in Rule 38 of the rules of this Court.

WILLIAM L. KINNEAR,
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COUNSEL FOR PETITIONER

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## PROOF OF SERVICE

I, William L. Kinnear, Counsel for Kinnear Weed Corporation, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 15th day of November, 1961, I served copies of the foregoing "PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI" by mailing the required copies in duly addressed envelope by U. S. Mail, postage prepaid to Mr. Walter B. Morgan, Esq., Counsel for Respondent, Post Office Box 2180, Houston, Texas.

DATED: November 15th, 1961

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